93-652

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

MAUDINE BLAKEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES NEAL BLAKEMAN, as Executor of the Estate of C.E. BLAKEMAN, Deceased, ROBERT EARL BLAKEMAN and KAREN A. WHALEY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is an innocent property owner, whose interest in real property was forced to be sold as a result of a judicial foreclosure pursuant to 26 U.S.C. §7403(c), and who was free of any responsibility for the tax liability sought to be foreclosed, justly compensated if she receives only a fixed percentage of the foreclosure proceeds without receiving reimbursement for litigation expenses and federal income taxes detrimentally incurred by the innocent property owner in the judicial foreclosure proceeding?

II. Was the Fifth Circuit justified in refusing to consider this question under the record in this case?

LIST OF PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the Fifth Circuit Court of Appeals, which is the court whose judgment is sought to be reviewed:

Plaintiff, the United States of America; and

Defendants, Maudine Blakeman, and Messrs. James Neal Blakeman, as executor of the estate of C.E. Blakeman, Deceased, and individually, and Robert Earl Blakeman and Mrs. Karen A. Whaley.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Maudine Blakeman, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 21, 1992, and modified by the Fifth Circuit's opinion on rehearing entered July 28, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (1a-24a),[1] as modified on rehearing (56a-64a), is reported in full at 997 F.2d 1084 (5th Cir. 1993). The Fifth Circuit's opinion, as modified, affirms in part and reverses and remands in part the judgment (43a-55a) and opinion (25a-42a) of the United States District Court for the Northern District of Texas, which is reported at 750 F. Supp. 216 (N.D. Tex. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1992. The Court granted Mrs. Blakeman's petition for rehearing and on July 28, 1993, entered its opinion modifying its original opinion of July 21, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

26 U.S.C. § 7403(a)-(c)

ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX

(a) Filing. – In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been

[1] References herein to " ___a" are to pages in the appendix of this Petition.

made, the Attorney General or his delegate, at the request of the Secretary [of the Treasury], may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For the purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties. – All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and Decree. – The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

STATEMENT OF THE CASE

A. Statement of Facts.

C.E. Blakeman ("C.E.") died on May 25, 1978. He was survived by his wife, Maudine Blakeman ("Mrs. Blakeman"), and three children from a previous marriage – James Neal Blakeman, Robert Earl Blakeman and Karen Whaley (sometimes collectively referred to herein as the "children"). At the time of his death, C.E. and Mrs. Blakeman resided upon 101.5954 acres of land located in Fort Worth, Texas (the "Randol Mill Property"). The Randol Mill Property was owned by C.E. as his separate property at the time of his death and was the major asset of his estate (the "estate").

C.E. left the Randol Mill Property to his children by his last will and testament. After C.E.'s death, a dispute arose between Mrs. Blakeman and the children as to the rights of each in the Randol Mill Property. Suit, to which they were all parties, was brought in the Probate Court in Tarrant County, Texas, to determine their respective rights, and on May 7, 1980, a final judgment was entered. The judgment determined that Mrs. Blakeman had a rural homestead in the Randol Mill Property and that she was entitled to the use of 100 acres of the Randol Mill Property, to be selected by her, for as long as she occupied the same as her homestead. The United States was not a party to the Probate Court action.

After the Probate Court judgment was entered, Mrs. Blakeman designated 100 acres of the Randol Mill Property as her homestead (the "Homestead Property"), and she has resided there continuously since C.E.'s death in 1978.

On July 17, 1980, the Secretary of the Treasury made assessments against C.E.'s estate in the amount of $124,820.93 in federal estate tax and $12,651.37 in interest. On July 21, 1980, and August 18, 1980, the Secretary made additional assessments for interest and penalties relating to the unpaid estate tax. On March 16, 1981, the Internal Revenue Service filed a notice of federal tax lien for the assessments against the estate with the Tarrant County Clerk. The Service made demand upon James Neal Blakeman, as executor of C.E.'s estate, for payment of the outstanding federal estate taxes.

The United States filed suit on June 16, 1986, to reduce to judgment the assessment of the federal estate tax liabilities of the estate; to foreclose federal tax liens against certain real property located in Fort Worth, Tarrant County, Texas; and to obtain judgment against James Neal Blakeman, as executor of the estate and individually, for the estate taxes to the extent of all payments of debts of the estate, and against the survivors of C.E. based on the value of any assets they might have received from the estate.

B. Proceedings Below.

The District Court determined that Mrs. Blakeman had a rural homestead interest in the Randol Mill Property from the date of C.E.'s death until trial. The District Court held that the special tax lien under 26 U.S.C. § 6324 had expired, but the general tax lien under 26 U.S.C. § 6321 was valid and attached to the property at issue – subject to Mrs. Blakeman's homestead interest.

The District Court ordered foreclosure of the federal tax lien, and, from the proceeds of such foreclosure, awarded Mrs. Blakeman her interest in the property as of the foreclosure date, but limited the government's recovery to the estate's interest in the Randol Mill Property on the date the federal tax lien arose in 1980. The District Court found that Mrs. Blakeman had a 60.352% interest in the Homestead Property and that the United States had a 25.577% interest in the Homestead Property. The District Court also ordered that the difference between the value of Mrs. Blakeman's interest in the Homestead Property on the date the federal tax lien arose and the value of her interest on the date judgment was entered be paid to the estate – irrespective of whether the government was otherwise able to collect the tax liability of the estate.

The District Court entered judgment providing for distribution of the foreclosure sale proceeds as follows:

(1) 60.352% of the gross proceeds of sale to Mrs. Blakeman;

(2) Satisfaction of the reasonable and necessary costs of sale;

(3) To the United States, in satisfaction of its federal tax lien, but not more than 25.577% of the gross sales proceeds from such property; and

(4) The excess, if any, to C.E.'s estate.

The United States appealed to the Fifth Circuit and the children and Mrs. Blakeman cross-appealed. The Fifth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

On July 21, 1992, the Fifth Circuit held that the District Court was not clearly erroneous in concluding that Mrs. Blakeman's homestead interest in the property was rural. The Court concluded that the District Court erred in holding that the reach of the federal tax lien – arising from the unpaid estate tax – was limited to the estate's interest in the Randol Mill Property on the lien's attachment date. The Court found that the federal tax lien reached the interests of C.E.'s estate as of the date of the foreclosure sale.

The Fifth Circuit also found that Mrs. Blakeman did not properly urge the applicability of 26 U.S.C. § 7520 to the District Court and, therefore, she waived her right to raise on appeal the propriety of using the tables promulgated under 26 U.S.C. § 7520 for valuation purposes.

The Fifth Circuit did not address Mrs. Blakeman's claim that she should be compensated for the taxes she will pay due to the sale of her Homestead Property, on the ground that Mrs. Blakeman did not raise in the District Court her position that the District Court could require the government to pay the costs and expenses attendant to the judicial foreclosure, including compensation for taxes Mrs. Blakeman will pay due to the sale of the Homestead Property.

The Fifth Circuit stated that it did not believe that its refusal to allow Mrs. Blakeman to raise the issue on appeal would result in a substantial miscarriage of justice. The Fifth Circuit reasoned that Mrs. Blakeman could have presented in the District Court her position that, pursuant to 26 U.S.C. § 7403, the District Court could

require the United States to pay the costs and expenses attendant to the judicial foreclosure.

Mrs. Blakeman filed a petition for rehearing on the grounds that the Court of Appeals erred in refusing to (1) apply the tables promulgated under 26 U.S.C. § 7520 for valuation of Mrs. Blakeman's interest in the Homestead Property and (2) consider Mrs. Blakeman's claim for taxes she will pay arising from the judicial foreclosure in this case.

On rehearing, the Fifth Circuit modified its opinion by holding that (1) Mrs. Blakeman's homestead interest should be valued according to the tables promulgated pursuant to 26 U.S.C. § 7520, (2) Mrs. Blakeman did properly raise the issue of the applicability of § 7520 in the District Court, and (3) Mrs. Blakeman did not waive her right to assert that the District Court should have used the tables promulgated pursuant to 26 U.S.C. § 7520.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S METHOD OF COMPUTING MRS. BLAKEMAN'S COMPENSATION FOR HER HOMESTEAD INTEREST, WHICH IS SUBJECT TO JUDICIAL FORECLOSURE DUE TO THE NONPAYMENT OF TAX LIABILITIES OF OTHERS, DEPARTS SERIOUSLY FROM THE STANDARD ARTICULATED BY THIS COURT.

A. Mrs. Blakeman should be compensated for her litigation expenses and the federal income taxes she will incur as a result of the forced sale of her homestead interest.

Mrs. Blakeman is an innocent bystander in a judicial foreclosure proceeding arising under 26 U.S.C. § 7403(c). The Fifth Circuit's method of computing Mrs. Blakeman's compensation for her lost homestead interest departs significantly from the standard articulated by this Court in *United States v. Rodgers,* 461 U.S. 677 (1983). The Fifth Circuit's method of computation significantly undercompensates Mrs. Blakeman for her homestead interest.

Section 7403(c) empowers district courts to "determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property . . . and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States." This Court has read Section 7403(c) "to contemplate, not merely the sale of the delinquent taxpayer's own interest, but the sale of the entire property (as long as the United

States has any 'claim or interest' in it), and the recognition of third-party interests through the mechanism of judicial valuation and distribution." *United States v. Rodgers*, 461 U.S. at 693-94. Several guiding principles derive from *Rodgers*, and these lodestars are missing in the Fifth Circuit's method of computing Mrs. Blakeman's compensation for her homestead interest:

(1) "The exact method for the distribution required by § 7403 is not before us at this time." *Id.* at 698.

(2) While "the provisions of Section 7403 are broad and profound:"

> § 7403 is punctilious in protecting the vested rights of third parties caught in the Government's collection effort, and in ensuring that the Government not receive out of the proceeds of the sale any more than that to which it is properly entitled." *Id.* at 699.

(3) "[T]he exercise in any particular case of the power granted under § 7403 to seek the forced sale of property interests other than those of the delinquent taxpayer is left in the first instance to the good sense and common decency of the collecting authorities." *Id.*

(4) "Whatever property rights attach to a homestead under Texas law are adequately discharged by the payment of the compensation, and no further deference to state law is required, either by § 7403 or by the Constitution." *Id.* at 702.

(5) "[W]e are not blind to the fact that in practical terms financial compensation may not always be a completely adequate substitute for a roof over one's head." *Id.* at 704.

The Fifth Circuit awarded Mrs. Blakeman only a fixed percentage of the foreclosure proceeds. This method for computing Mrs. Blakeman's compensation does not adequately compensate Mrs. Blakeman for her homestead interest. Mrs. Blakeman will suffer financially in various ways that have not been addressed or considered by the courts below and, as a result, she has not been adequately compensated for her interest in the property.

First, Mrs. Blakeman will be liable for federal income taxes on the gain she realizes and recognizes on the forced sale of her homestead. Victims of eminent domain or other forms of government condemnation have been provided relief by Congress from this type of gain arising from a forced sale of the property as a result of government taking by virtue of 26 U.S.C. § 1033. Mrs. Blakeman does not appear to come within that tax deferral provision. Therefore, the sale proceeds received by Mrs. Blakeman will be subject to a 28% federal income tax rate (the present maximum tax rate on capital gain income recognized by individuals) and, as a result, the proceeds available to Mrs. Blakeman will be subject to a 28% reduction.

Second, Mrs. Blakeman has been required to incur substantial litigation costs necessary to defend her claim in the courts below from contrary views urged by the United States and the Blakeman children. Mrs. Blakeman has prevailed in the courts below on almost all of the critical points asserted by her, namely, that (1) her homestead interest in the Randol Mill Property was a rural

homestead, (2) she had not abandoned her homestead, and (3) her homestead interest should be valued under applicable Treasury tables pursuant to 26 U.S.C. § 7520. The total amount of her litigation costs, plus income taxes, will cause Mrs. Blakeman to suffer an approximately one-half reduction in the proceeds available to her to replace her homestead.

Without full compensation to Mrs. Blakeman for her interest in the foreclosed property, "manifest injustice," *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950), to Mrs. Blakeman would result. In the words of this Court in *Commodities Trading Corp.*, a decision arising in the context of determining just compensation in an eminent domain case but applicable here nevertheless, "the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" *Id.*

This Court has stated as a goal in judicial foreclosure proceedings in compensating innocent third parties, who have no responsibility for the tax liability sought to be foreclosed, that the courts should use "good sense and common decency." *Rodgers*, 461 U.S. at 699. The Ninth Circuit in *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970), has emphasized that the foreclosing court is to grant innocent parties "just compensation" for their interests:

> Thus, the statute contemplates that the district court may subject the interests of persons other than the taxpayer to an involuntary conversion during the course of enforcing the Government's lien on the delinquent taxpayer's interest

> in the same property. The owners other than the taxpayer, however, are entitled to *just compensation* from the proceeds of the sale for that "taking." 424 F.2d at 1146 (emphasis added).

To allow Mrs. Blakeman to suffer at least a one-third reduction in proceeds attributable to federal income taxes, and an additional reduction in her award for litigation costs, perhaps totaling in the aggregate up to a one-half diminution, means that Mrs. Blakeman will not have been justly compensated for the United States having forcibly sold her property. Mrs. Blakeman has not been treated fairly or justly. She has contributed not one thing to the circumstances that have been forced upon her. Yet, under the Fifth Circuit's decision in this case, she will receive less than one-half of her interest in her homestead because of income taxes and litigation costs required to be suffered by her. This Court's decision in *United States v. Rodgers, supra,* has not been fulfilled.

In another context, the courts have recognized the severe consequences resulting from the imposition of a tax liability on taxpayers who are to experience a forced sale of their property by the government. In *Gibson v. United States,* 761 F. Supp. 685 (C.D. Cal. 1991), the court held that taxpayers were entitled to an injunction against the Internal Revenue Service on account of the irreparable injury that they would suffer. In that case, the court found that (1) the taxpayer "would be unable to recover compensation for all of the costs they would incur,"[2] (2) "the increased tax liabilities caused by liquidation of

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[2] 761 F. Supp. at 692.

assets and any tax liabilities, forfeitures, or other penalties resulting from early distribution of the retirement plan would not be compensable,"[3] (3) the taxpayers "would not be compensated for the sacrifices and hardships they would suffer if forced to sell their home and other belongings and go deep into debt to raise the funds needed to pay the deficiency,"[4] (4) the taxpayers "may not be deprived of the necessities of life, the monetary harm they will suffer will not be compensable at a later time,"[5] and (5) taxpayers' "injury is irreparable as their remedy at law is not adequate because it will not fully compensate them for the harm caused."[6]

B. If this Court determines that Mrs. Blakeman should be compensated for her litigation expenses and federal income taxes arising from a forced sale of her homestead interest, the District Court has the authority to fashion suitable relief on remand.

Section 7403 empowers district courts, sitting in equity, to find the interests of the parties and order a distribution accordingly. *United States v. Rodgers*, 461 U.S. 677, 703-13 (1983); *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957), *cert. denied*, 355 U.S. 889 (1957); *see also United States v. Myers*, 76-2 U.S.T.C. (CCH) ¶ 9534, 38 A.F.T.R.2d (P-H) 5400 (D. Mont. 1976). The emphases of the power of a court adjudging foreclosures under Section 7403 are

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

flexibility, *Boyd, supra,* and to do justice. *Heartline Farms, Inc. v. Daly,* 128 B.R. 246, 253 (D. Neb. 1990) ("Equity and justice become obscure where black letter law is applied literally with the effect of minimizing or even defeating underlying policies."). No precise formula is mandated for the court to follow.

The Ninth Circuit in *United States v. Overman,* 424 F.2d 1142 (9th Cir. 1970), has confirmed the broad power of the district court in ordering foreclosure and compelling relief appropriate to the interests of all of the parties. The Ninth Circuit said in *Overman* that Section 7403:

> confers broad discretionary powers upon the court in shaping a decree designed to work substantial justice among all interested persons. "Congress [in enacting § 7403] intended that the Court function with the full traditional flexibility of the Chancellor, *United States v. Morrison,* 5 Cir., 247 F.2d 295." (*United States v. Boyd* (5th Cir.) 246 F.2d 477, 481, *cert. denied,* 355 U.S. 889 (1957)).

424 F.2d at 1146.

Here, the District Court can fashion suitable relief appropriate to a court sitting in equity. The court therefore can award to Mrs. Blakeman sufficient compensation to make her whole.

II. THE FIFTH CIRCUIT ERRED IN REFUSING TO CONSIDER WHETHER MRS. BLAKEMAN IS ENTITLED TO JUST COMPENSATION FOR LITIGATION EXPENSES INCURRED BY HER IN THIS ACTION AND FOR FEDERAL INCOME TAXES INCURRED ON THE FORCED SALE OF HER HOMESTEAD INTEREST.

A. Mrs. Blakeman sufficiently presented her compensation argument to the District Court.

The Fifth Circuit concluded that Mrs. Blakeman had not preserved her claim that her share of the sales proceeds from the Randol Mill Property should include not only the value of her interest in the property but also a reimbursement of the amount of the federal income tax liability Mrs. Blakeman would incur as a result of the capital gain she would realize upon the involuntary sale of her interest in the property. Mrs. Blakeman submits, however, that she did in fact preserve a claim for complete compensation for her losses resulting from the forced sale of her interest in the property, by (1) making a claim for litigation expenses in her brief accompanying her Motion for Partial Summary Judgment and Brief in Support Thereof (65a-100a) filed in the District Court; (2) claiming she is entitled to litigation expenses in her Proposed Findings of Fact and Conclusions of Law; and (3) joining in the statement in the Joint Pretrial Order that one of the issues to be resolved in this case was "If the Court grants Defendant Maudine Blakeman's Motion for Leave to Amend her First Amended Answer, whether, under Section 7430 of the [Internal Revenue] Code, Defendant Maudine Blakeman is entitled to an award of judgment for costs and attorneys' fees." These statements

were sufficient to put the District Court and the other parties in the case upon notice of Mrs. Blakeman's claim to be fully compensated for the economic losses she would suffer as a result of the forced sale of her property.[7]

The rule controlling this issue is the rule that, for an appellate court to decide an issue that the trial court did not address, the argument must be raised sufficiently for the trial court to have ruled on it. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) (issue of validity of relief granted by trial court adequately preserved by appellant's filing of motion for reconsideration,

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[7] The statements in Mrs. Blakeman's Motion for Summary Judgment and the Joint Pretrial Order referred to Mrs. Blakeman's claim for attorneys' fees and other litigation expenses but not to the federal income tax liability on Mrs. Blakeman's capital gain from the forced sale. During the course of Mrs. Blakeman's appeal to the Court of Appeals, new authority developed to support Mrs. Blakeman's claim for reimbursement of the federal income tax liability, in the decision in *Gibson v. United States*, 761 F. Supp. 685 (C.D. Cal. 1991), a claim for which no clear authority existed at the time of the District Court proceeding. Mrs. Blakeman therefore raised the specific claim for such taxes for the first time at the appellate level. Mrs. Blakeman did not specifically address her other expenses, such as the attorneys' fees and other litigation costs, before the Court of Appeals. Both the tax liability and the attorneys' fees and other litigation expenses are substantial amounts that Mrs. Blakeman will have incurred involuntarily and through no fault of her own. Accordingly, in the interest of serving equity, the Court of Appeals should have exercised its discretion to determine the issue of fully compensating Mrs. Blakeman for that economic loss. Since the Court of Appeals failed to exercise its discretion in that manner, this Court should take the opportunity to exercise its own discretion to grant equity in this case.

giving trial court sufficient opportunity to consider issue). Several courts of appeals have held that an issue that was not argued in the trial court nevertheless was preserved for consideration by the appellate court when the party raising the issue raised it in pleadings or motions filed with the trial court. *E.g., Batiansila v. Advanced Cardiovascular Systems, Inc.*, 952 F.2d 893 (5th Cir. 1992) (joint pretrial order contained "contested issue of fact" that referred to whether party was entitled to recover attorneys' fees and penalties; court determined this issue could be interpreted to mean that other party had not waived its equitable defense to the penalties); *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 467 (9th Cir. 1990) (issue raised in opposition to motion for summary judgment and supporting deposition and declaration); *Dobosz v. Walsh*, 892 F.2d 1135, 1140 (2d Cir. 1989) (issue raised in reply memorandum on motion for summary judgment); and *Tandy Brands, Inc. v. Harper*, 760 F.2d 648, 652 (5th Cir. 1985) (issue raised in answer to complaint, motion for summary judgment, and motion for judgment notwithstanding verdict).

An example of an appellate court's determination that a party had adequately raised an issue in the trial court is *Batiansila v. Advanced Cardiovascular Systems, Inc., supra.* In that case, the defendant, Advanced Cardiovascular Systems, Inc. ("ACS"), appealed from a judgment of the district court finding ACS liable on a terminated employee's claim of penalties and attorneys' fees for failure to pay bonus. 952 F.2d at 894. On appeal, ACS contended that the plaintiff, Mr. Batiansila, was not entitled to penalties because he had failed to show that the failure to pay bonus was due to bad faith on the part

of ACS. Mr. Batiansila contended that ACS had waived this point by not raising it in the district court. *Id.* at 896. ACS contended that it had not waived the bad faith argument and pointed to the pretrial order for support. The pretrial order contained a "Contested Issue of Fact" that "refers to whether Mr. Batiansila is entitled to recover attorney's fees and penalties." *Id.* The court reasoned that "if ACS had waived its equitable defense, this issue of fact would be completely unnecessary – the penalties and fees would automatically follow a finding of liability for the bonus (which was listed as Issue of Fact Number Six.)" *Id.* at 896 n.9.

The *Batiansila* decision and the other cases cited above indicate that Mrs. Blakeman's raising the issue of complete compensation for her economic losses in her Motion for Summary Judgment, in her Proposed Finding of Fact and Conclusions of Law, and by joining in the Joint Pretrial Order was adequate to put the District Court and the other parties in this case upon notice of her claim for such compensation and thus to preserve the issue for the Court of Appeals. Accordingly, the Court of Appeals erred in holding that Mrs. Blakeman failed to preserve this issue.

B. This Court's refusal to consider Mrs. Blakeman's compensation argument would result in a miscarriage of justice.

Even if Mrs. Blakeman were to assume, for the sake of argument, that she did not properly urge her compensation argument to the District Court, a view with which she does not agree, Mrs. Blakeman respectfully submits

that this Court's refusal to consider the compensation argument would result in a miscarriage of justice. In *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), this Court stated:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might result.' *Hormel v. Helvering*, 312 U.S., at 557, 61 S.Ct. at 721.[8]
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> [8] These examples are not intended to be exclusive.

428 U.S. 106, 120-121.

Pursuant to this Court's opinion in *Singleton*, the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal. Mrs. Blakeman recognizes that

> [i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by

> final decision there of issues upon which they have had no opportunity to introduce evidence.'

Singleton, 428 U.S. at 120.

The Fifth Circuit, however, has recognized three exceptions to this general rule, all of which require a showing that a miscarriage of justice will result if the issue is not considered on appeal. These three exceptions are (i) the issue is purely a question of law;[8] (ii) the proper resolution of the issue is beyond doubt;[9] and (iii) consideration of the issue would not require any further factual development.[10] Two of the three exceptions are applicable in this case: (1) The issue of whether Mrs. Blakeman should be compensated for her costs of litigation and taxes on a sale of the property is purely a

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[8] *See, e.g., Pegues v. Morehouse Parish School Board*, 706 F.2d 735, 738 (5th Cir. 1983); *Evans v. Triple R Welding & Oil Field Maintenance Corp.*, 472 F.2d 713, 716 (5th Cir. 1973).

[9] *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1117 n.20 (5th Cir. 1985); *Texas v. United States*, 730 F.2d 339, 358 (5th Cir. 1984).

[10] *See, e.g., Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1145 (5th Cir. 1981) ("When no further factual development is required and a miscarriage of justice would otherwise result, appellate courts in this Circuit have been willing to consider new issues for the first time on appeal."); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir 1976) ("[T]he rationale for the rule [of not considering issues raised for the first time on appeal] requires its application if additional facts would have been developed in the trial court had the new theory been presented there; in that case judicial economy is served and prejudice is avoided by binding the parties to the facts presented and the theories argued below.").

question of law; and (2) consideration of this issue would not require any further factual development.[11]

Mrs. Blakeman respectfully submits that this Court's refusal to consider whether she is entitled to costs of litigation and taxes would result in a miscarriage of justice. If this Court refuses to consider the question, Mrs. Blakeman's costs of litigation and taxes will account for approximately 50% of her share of the gross proceeds from a foreclosure sale of the Homestead Property. To illustrate, assume the government had sold the Homestead Property for $2,200,000 at a foreclosure sale during August 1993.[12] Under 26 U.S.C. § 7520, Mrs. Blakeman would be entitled to 58.536% of the sales proceeds, or $1,287,792,[13] on a foreclosure sale of the property.[14]

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[11] Mrs. Blakeman recognizes, however, that, if this Court decides she should be compensated for her costs of litigation and taxes arising from a sale of the Homestead Property, the District Court would be required to hold an evidentiary hearing to determine the amount of such costs and taxes.

[12] The Internal Revenue Service recently provided the undersigned with an appraisal valuing the 100-acre Homestead Property at $2,200,000.

[13] $2,200,000 (gross proceeds) x 58.536% (Mrs. Blakeman's share of the gross proceeds).

[14] The interest rate (rounded to the nearest 2/10ths of 1%) equal to 120% of the federal mid-term rate in effect for August 1993, the month in which the valuation date falls, is 6.4%. Rev. Rul 93-51, 1933 I.R.B. 26 (Table 5). The remainder factor set forth I.R.S. Publication 1457, Table S(6.4) for a person age 65 (Mrs. Blakeman's age as of August 1993), based upon an interest rate of 6.4%, is .41464, or 41.464%. The life estate factor is therefore .58536, or 58.536%. Accordingly, under 26 U.S.C. § 7520, Mrs. Blakeman would be entitled to 58.536% of the gross proceeds from a foreclosure sale of the Homestead Property in August 1993.

Assuming a 28% federal income tax rate on capital gain income, Mrs. Blakeman would be liable for $360,582[15] in federal income taxes. The amount remaining after payment of federal income taxes would be $927,210. From this amount, Mrs. Blakeman would pay her costs of litigating this action since 1986. The amount remaining would be less than 50% of the gross proceeds realized by Mrs. Blakeman.

The loss of over 50% of the gross sales proceeds would be particularly egregious since Mrs. Blakeman, as an innocent third party who was not liable for the estate taxes due in this case, has had to endure the expense and inconvenience of over six years of litigation. Moreover, in Mrs. Blakeman's Motion for Partial Summary Judgment, she pointed out to the government that it should not have asserted personal liability against her for the estate taxes at issue in this case. The government finally accepted this argument at trial (nearly 10 months after Mrs. Blakeman filed her Motion for Summary Judgment) and abandoned its claim against Mrs. Blakeman for personal liability. (*See* Transcript of Trial, pp. 45-46.)

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted. If this Court finds that Mrs. Blakeman should be compensated for her litigation expenses and federal income taxes arising from the

[15] $1,287,792 (Mrs. Blakeman's share of the gross proceeds) x 28% (maximum tax rate on capital gains).

forced sale of her homestead interest, the case should be remanded for an evidentiary hearing concerning the amount that Mrs. Blakeman is entitled to receive as reimbursement for litigation expenses and federal income taxes incurred on the sale of her homestead interest.

Respectfully submitted,

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October 25, 1993

APPENDIX

Opinion and Judgment of Fifth Circuit Court of Appeals 1a

Memorandum Opinion of the U.S. District Court for the Northern District of Texas 25a

Judgment of the U.S. District Court for the Northern District of Texas 43a

Opinion on Rehearing of Fifth Circuit Court of Appeals 56a

Motion for Summary Judgment with Supporting Memorandum of Law 65a

UNITED STATES of America,
Plaintiff-Appellant-Cross-Appellee,

v.

James Neal BLAKEMAN, As Executor of the Estate of C.E. Blakeman, Deceased, Robert Earl Blakeman and Karen A. Whaley, Defendants-Appellees-Cross-Appellants and Cross-Appellees,

RIDGLEA BANK, et al., Defendants-Appellees,

v.

Maudine BLAKEMAN, Defendant-Appellee-Cross-Appellant

No. 91-1027.

United States Court of Appeals,
Fifth Circuit

July 21, 1992.

Appeals from the United States District Court for the Northern District of Texas.

Before JOLLY, JONES, and EMILIO M. GARZA, Circuit Judges:

EMILIO M. GARZA, Circuit Judge:

The United States brought this suit seeking judgment against the estate of C.E. Blakeman for federal estate taxes and to foreclose a federal tax lien against property of the estate.[1] The district court entered judgment in

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[1] The United States also sought judgment against James Neal Blakeman, individually and as executor of C.E.'s estate, for monies paid out of the estate while federal estate tax remained

favor of the United States, enforced the government's general federal tax lien, and ordered foreclosure of certain estate property. 750 F. Supp. 216 (N.D.Tex. 1990). The parties have filed cross-appeals.

I

A

C.E. Blakeman ("C.E.") died on May 25, 1978. He was survived by his wife, Maudine Blakeman ("Mrs. Blakeman"), and three children from a previous marriage – James Neal Blakeman, Robert Earl Blakeman, and Karen Whaley ("the Blakeman children"). At the time of his death, apart from the community property he shared with his wife, C.E. owned as his separate property a tract of land known as the Randol Mill Property – the major asset of his estate – which consisted of 101.5954 acres of land located in Fort Worth, Tarrant County, Texas.

C.E.'s 1973 will left all real property of his estate, including the Randol Mill Property, to his children. After C.E.'s death, a dispute arose between the Blakeman children and Mrs. Blakeman as to their respective rights in C.E.'s estate. Following a trial, the Tarrant County Probate Court entered judgment declaring that the Randol Mill Property is the rural homestead of C.E. and Mrs. Blakeman. That judgment ordered that Mrs. Blakeman have the use and benefit of 100 acres of the Randol Mill

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unpaid. Ridglea Bank, the State of Texas, Tarrant County, Texas, Fort Worth Independent School District, and the City of Fort Worth, were also parties to the lawsuit.

Property for as long as she occupied the property as her homestead.[2]

On June 17, 1980, the Secretary of the Treasury made assessments against the estate in the amount of $124,820.93 in federal estate tax and $12,651.37 in interest. On July 21, 1980, the Secretary made an additional assessment of interest and penalties relating to the unpaid estate tax in the amounts of $1,395.26 and $31,205.23, respectively. Another assessment for interest in the amount of $1,436.30 was made on August 18, 1980. On March 16, 1981, the I.R.S. filed a notice of federal tax lien for the assessments against the estate with the Tarrant County Clerk. The I.R.S. made demand upon James Neal Blakeman, as executor of C.E.'s estate, for payment of the outstanding federal estate taxes.

B

The government filed suit on June 16, 1986, seeking judgment against the estate for federal estate taxes and judicial foreclosure on its federal tax lien against the Randol Mill Property. Following trial, the district court found that Mrs. Blakeman had a rural homestead interest in the Randol Mill Property from the date of C.E.'s death until trial. The district court held that the special tax lien under 26 U.S.C. § 6324 had expired, but the general tax lien under 26 U.S.C. § 6321 was valid and attached to the

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[2] After the Probate Court judgment was entered, Mrs. Blakeman designated the Randol Mill Property as her homestead and has resided there continuously since C.E.'s death in 1978.

property at issue – subject to Mrs. Blakeman's homestead interest. The district court ordered foreclosure of the federal tax lien, and, from the proceeds of such foreclosure, awarded Mrs. Blakeman her interest in the property as of the foreclosure date, but limited the government's recovery to the estate's interest in the property on the date the federal tax lien arose in 1980.[3] The district court also ordered that the difference, between the value of Mrs. Blakeman's interest on the date the federal tax lien arose and the value of her interest on the date judgment was entered, be paid to the estate – irrespective of whether the government was otherwise able to collect the tax liability of the estate.

The parties cross-appeal, raising various contentions of district court error and challenging specific district court rulings.[4] The issues presented are:

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[3] The district court found Mrs. Blakeman had a 60.352 percent interest in the property and the government had a 25.577 percent interest in the property.

[4] The following is a summation of the parties' arguments on appeal:

The government. The government argues that the district court erred in holding that the reach of the government's federal tax lien – arising from the unpaid estate tax – was limited to the estate's interest in the Randol Mill Property on the lien's attachment date. The government does not challenge the district court's finding relating to the special estate tax lien.

The Blakeman Children. The Blakeman children argue that the government does not have a valid lien on the Randol Mill Property because the government's complaint contains no specific reference to 26 U.S.C. § 6321 and fails to state a claim based on the general tax lien. The Blakeman children argue, therefore, that the government is not entitled to foreclose on the Randol Mill Property. Alternatively, the Blakeman children argue, if the

(a) Whether the district court properly concluded the government's complaint stated a claim based on the general federal tax lien arising under 26 U.S.C. § 6321;

(b) Whether the district court properly concluded that the Randol Mill Property was the rural homestead of Mrs. Blakeman;

(c) Whether the district court properly valued the Randol Mill Property; and

(d) Whether Mrs. Blakeman is entitled to compensation for the taxes she will pay as a result of the foreclosure sale.

II

A

The district court found that the government's complaint stated a claim arising under 26 U.S.C. § 6321 – the

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government has a valid lien on the Randol Mill Property and is entitled to foreclose, the district court erred in finding that Mrs. Blakeman has a rural homestead in the Randol Mill Property. The Blakeman children argue that the character of the homestead should be determined at the time of the trial or at the time of the foreclosure sale.

Mrs. Blakeman. Mrs. Blakeman contends that the district court erred in failing to value her homestead interest as of June 17, 1980 – the date the general tax lien attached to the remainder interest in the homestead property. Mrs. Blakeman argues that she is entitled to at least 74.42 percent of the gross proceeds from the sale of the Randol Mill Property, without any reduction to account for the period she occupied the property. Mrs. Blakeman also contends that she should be compensated for the taxes she will pay as a result of a sale of her homestead interest.

Other defendants. Ridglea Bank, State of Texas, Tarrant County, Texas, Fort Worth Independent School District, and the City of Fort Worth did not appeal.

general federal tax lien statute.[5] A tax lien arising under section 6321 is one of two types of tax liens the United States has available to it to enforce the estate tax liability of a decedent's estate. *See United States v. Cleavenger*, 517

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[5] The district court found that:

> Although it is not drawn as articulately as might be desired, plaintiff's complaint constitutes a claim to foreclose on the general federal tax lien described in 26 U.S.C. § 6321 and is sufficient to give defendants notice of such a claim. Conley v. Gibson, 355 U.S. 41, 47, 48 (1957).
>
> Requirements of the general tax lien include: (a) assessment within three years after a return is filed, and (b) collection began within six years of assessment. 26 U.S.C. § 6501(a); 26 U.S.C. § 6502(a). The parties have stipulated that the following assessments were made:
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> | | |
> |---|---|
> | June 17, 1980 | $124,820.93 estate taxes |
> | | $ 12,651.37 interest |
> | July 21, 1980 | $ 31,205.23 penalties |
> | | $ 1,395.26 interest |
> | August 18, 1980 | $ 1,436.30 interest |
>
> As a result of a payment and the abatement of a delinquent penalty, which was stipulated, the balance of the assessments due was $90,495.65 as of July 21, 1980. There is apparently no dispute that the assessments were timely. . . . [O]n March 16, 1981, plaintiff filed a notice of federal tax lien with the Clerk of Tarrant County, Texas; . . . plaintiff made demand on defendant James Neal Blakeman, as executor of the estate of C.E. Blakeman, deceased; . . . the taxes were not paid; . . . the plaintiff filed its complaint June 16, 1986. Accordingly, the Court finds that plaintiff's suit to enforce its general tax lien was timely filed.

750 F.Supp. at 221 ("Memorandum Opinion"). The district court found the special federal estate tax lien had expired as a matter of law.

F.2d 230, 232 (7th Cir. 1975). The other type of lien to secure payment of federal estate taxes is known as the special estate tax lien. *Id.* The special estate tax lien arises under 26 U.S.C. § 6324(a)(1), which provides that, "[u]nless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death. . . . " The special estate tax lien automatically attaches to all property in the decedent's estate upon the decedent's death; the government need not make an assessment or a demand. *See Kleine v. United States*, 539 F.2d 427, 429 (5th Cir. 1976); *accord United States v. Vohland*, 675 F.2d 1071, 1074 (9th Cir. 1982); *see also Detroit Bank v. United States*, 317 U.S. 329, 332, 63 S.Ct. 297, 298, 87 L.Ed. 304 (1943).

The general tax lien arises under 26 U.S.C. § 6321 when the taxpayer fails to pay a federal tax liability, after assessment and notice are given and demand upon the taxpayer is made. *See Harris v. United States*, 764 F.2d 1126, 1128 (5th Cir. 1985). The lien continues until the taxpayer satisfies the debt or the statute of limitations runs. *See* 26 U.S.C. § 6322; *United States v. Wilkes*, 946 F.2d 1143 (5th Cir. 1991); *Texas Commerce Bank – Fort Worth v. United States*, 896 F.2d 152, 161 (5th Cir. 1990) (citations omitted). The government must collect the assessed tax liability "by levy or by a proceeding in court . . . within 6 years after the assessment of the tax . . . " 26 U.S.C. § 6502(a); *McCray v. United States*, 910 F.2d 1289, 1290 (5th Cir. 1990), *cert denied sub nom*, ___ U.S. ___, 111 S. Ct. 1313, 113 L.Ed.2d 246 (1991); *United States v. Verlinsky*, 459 F.2d 1085, 1086-87 (5th Cir. 1972). Section 6503(b) tolls the limitations period, however, "for the period the assets of

the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or the District of Columbia, and for 6 months thereafter." 26 U.S.C. § 6503(b).

The Blakeman children argue that the district court erred in concluding that the government's complaint stated a claim under 26 U.S.C. § 6321 because the complaint does not contain a specific reference to the general federal tax lien under 26 U.S.C. § 6321. The government argues, on the other hand, that the complaint states a claim based on the general tax lien under the strictures of Rule 8 and notice pleading. *See* Fed.R.Civ. P. 8. Moreover, the government argues that, even if the Blakeman children did not ascertain from the complaint that the government's claim was based on section 6321's general tax lien, the Blakeman children had sufficient notice of the government's theory before trial.[6] The government argues also that, because the special estate tax does not depend upon the filing of the notice of a lien, there would have been no reason to make such an allegation in the

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[6] The government suggests that this is the case because:
(1) the government's motion for partial summary judgment explicitly stated that its legal theory was based upon the § 6321 general tax lien;
(2) following the pretrial conference, the parties briefed the issue whether the government's liens had expired and these briefs dealt with both the general and the special tax liens; and
(3) on the morning of trial, the district court notified the parties that it determined the special lien had expired, but the general tax lien was still in effect and would be the basis for the government's claim.

complaint unless the government also sought relief under section 6321.

The Blakeman children's challenge consists simply of the argument that the complaint does not contain a specific reference to the general federal tax lien or section 6321 and the government relied solely on the special estate tax lien. We find that the Blakeman children's argument misapprehends the allegations in the complaint, the language of the Federal Rules of Civil Procedure and the substance of "notice pleading." See Fed.R.Civ. P. 8.

The Federal Rules of Civil Procedure create a presumption against rejecting pleadings for failure to state a claim. *See Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1985), *cert denied sub nom.*, 488 U.S. 848, 109 S. Ct. 129, 102 L.Ed.2d 102 (1988). A plaintiff must comply with Rule 8 in pleading a claim for relief in federal court; this court has determined that Rule 8 may be satisfied by a "plain recitation of the facts that a party believes entitles her to relief." *Id.* While the complaint does not expressly state that the government sought foreclosure of its tax lien under section 6321, the allegations in the complaint support a claim based on a general federal tax lien under 26 U.S.C. § 6321. The complaint: (i) sets forth the date of C.E.'s death and the date the government assessed the estate tax against the estate; (ii) contains allegations that the government gave notice of the assessment, demanded payment and filed notice of the lien with the Tarrant County Clerk; and (iii) states that the government was "seek[ing] foreclosure of its federal tax lien." Although neither the general or specific federal tax lien statute was referenced in the government's complaint, these allegations were sufficient to put defendants

on notice that the government was seeking foreclosure under the general federal tax lien statute. Therefore, finding that the government's complaint contains a claim to foreclose on the general federal tax lien described in 26 U.S.C. § 6321 and is sufficient to give defendants notice of such a claim, we hold that the government's general federal tax lien is valid and enforceable.

B

The district court concluded that Mrs. Blakeman had a rural homestead interest in the Randol Mill Property.[7] We review the district court's factual findings under the clearly erroneous standard, and review de novo the district court's application of law to those facts. *See In re Bradley*, 960 F.2d 502, 507 (5th Cir. 1992); *see also Zink v. United States*, 929 F.2d 1015, 1020-21 (5th Cir. 1991).

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[7] The district court found:

1. Until the death of C.E. Blakeman, the Randol Mill property was the rural homestead of C.E. Blakeman and Mrs. Blakeman.
2. At all times since the death of C.E. Blakeman, Mrs. Blakeman has continued to use, occupy and claim at least a 100-acre part of the Randol Mill property as her homestead.
3. The 100-acre part of the Randol Mill property Mrs. Blakeman selected as her homestead pursuant to the May 7, 1980, Probate Court judgment is legally described in Exhibit "B" to the judgment. . . .
4. Mrs. Blakeman has never abandoned the 100 acres as her rural homestead.
5. The 100 acres has been the homestead of Mrs. Blakeman at all times since the death of C.E. Blakeman.

Memorandum Opinion at 10-11.

The Blakeman children challenge the district court's finding that Mrs. Blakeman has a rural homestead interest in the Randol Mill Property. They argue that, pursuant to section 41.002(c) of the Texas Property Code,[8] Mrs. Blakeman's homestead is urban as a matter of law. The Blakeman children take the position that, under this statute, the presence of any one of the factors enunciated in section 41.002(c) mandates an urban characterization.[9]

Mrs. Blakeman contends the district court properly concluded that she has a rural homestead interest in the Randol Mill Property. Mrs. Blakeman argues that section 41.002(c) is not the exclusive test for determining the character of a homestead interest. Mrs. Blakeman argues that, at most, section 41.002(c) creates a presumption of a rural homestead when the section applies and does not create any presumption when it does not.[10]

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[8] Section 41.002(c) states:

> (c) A homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection.

Tex. Prop. Code Ann. § 41.002(c) (West Supp. 1992).

[9] Further, they argue that, even if the property is not served by municipal utilities, police or fire protection, there would still remain a fact question as to urban or rural status. In effect, the Blakeman children suggest a two-pronged analysis:

They propose that we inquire as to whether the property is served by municipal utilities, police or fire protection?

- If the answer is "yes," they propose that we classify it "urban" as a matter of law;
- If the answer is "no," they propose that this presents a fact question to be decided by the finder of fact.

[10] On appeal the government does not take a position concerning the character of Mrs. Blakeman's homestead interest.

In Texas, the law recognizes both rural and urban homesteads. *See* Tex. Const. art. XVI, § 51;[11] Tex. Prop. Code Ann. § 41.002 (West Supp. 1992);[12] *see also Bradley*,

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The government states, however, that "[s]hould this Court decide this issue in the children's favor, the Government's lien would necessarily attach to the estate's increased interest in the Randol Mill property."

[11] Section 51 provides,

> The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or lots amounting to not more than one acre of land, together with any improvements on the land; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

[12] Section 41.002, "Definition of Homestead" provides:

> "(a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land which may be in one or more lots, together with any improvements thereon.
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> (b) If used for the purpose of a rural home, the homestead shall consist of:
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> (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
>
> (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres,

960 F.2d at 506. An urban homestead cannot amount to more than one acre of land; a rural homestead cannot total more than 200 acres of land, for a family, or 100 acres, for a single adult person not otherwise entitled to a homestead. *See Bradley*, 960 F.2d at 506. While the characterization of a homestead is subject to change, the initial homestead characterization status, once established, is presumed to continue. *See In re Niland*, 825 F.2d 801, 808 (5th Cir. 1987). "Once the claimant has established the homestead character of her property, the burden shifts to the creditor to disprove the existence of the homestead." *Bradley*, 960 F.2d at 507, *citing Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971); *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex. App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.).[13]

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which may be in one or more parcels, with the improvements thereon.

(c) A homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection.

(d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created."

Tex. Prop. Code Ann. § 41.002 (West Supp. 1992). This section of the Texas Property Code was amended and subsection (c) became effective August 28, 1989.

[13] After the property has been dedicated as homestead property, the only way for the property to lose its homestead status is by death, abandonment, or alienation. *See Garrard v. Henderson*, 209 S.W.2d 225, 229 (Tex.Civ.App. – Dallas 1948, no writ). To prove the discontinuance of a homestead, a party may demonstrate that the homestead claimant abandoned the property – that is, the homestead claimant had the permanent intent to cease use of the property for homestead purposes. *See West*

Historically, Texas courts examining the homestead characterization question have regarded the issue whether a homestead is rural or urban as a question of fact. *See Fajkus v. First Nat'l Bank of Giddings*, 735 S.W.2d 882, 885 (Tex. App. – Austin 1987, writ denied), *citing Wilder v. McConnell*, 91 Tex. 600, 45 S.W. 145, 147 (1898); *Roberts v. Cawthon*, 26 Tex. Civ. App. 477, 63 S.W. 332, 334 (1901, no writ); *First State Bank of Grapeland v. Brown*, 490 S.W.2d 248, 250 (Tex. Civ. App. – Tyler 1973, no writ) (citations omitted); *Kimmey v. Goodrum*, 346 S.W.2d 901, 902 (Tex.Civ.App. – Waco 1961, writ ref'd n.r.e.) (citations omitted). Indeed, federal courts, interpreting and applying Texas law, have also considered this "urban"/"rural" differentiation as a determination rightly made by the factfinder. *See In re Moody*, 862 F.2d 1194, 1200 (5th Cir. 1989) ("Whether property is rural or urban is a question of fact. . . . "), *cert denied sub nom.*, ___ U.S. ___, 112 S. Ct. 1562, 118 L.Ed.2d 209 (1992), *aff'g, In re Moody*, 77 B.R. 580 (S.D. Tex. 1987); *In re Spencer*, 109 B.R. 715, 716 (W.D. Tex. 1989) ("question of rural or urban character is one of fact") (citation omitted); *In re Moody*, 77 B.R. 580, 591 (S.D. Tex. 1987). In *Moody*, the bankruptcy court recognized that the analysis involved in differentiating rural from urban cannot be reduced to a simple formula: "[u]nder Texas law, no set formula exists to label land as rural or urban [and t]he courts have examined and balanced many factors." *Moody*, 77 B.R. at 591.

Texas State Bank of Snyder v. Helms, 326 S.W.2d 47, 49 (Tex.Civ.App. – Eastland 1959, no writ). *See also Niland*, 825 F.2d 808, *quoting McFarland v. Rousseau*, 667 S.W.2d 929, 931 (Tex.App. – Corpus Christi 1984, no writ).

At the outset, we note that the Blakeman children argue a change in the law – that is, that section 41.002(c) (effective 1989) retroactively applies to previously designated homesteads – even where there were no other changed circumstances concerning the homestead. Therefore, we consider whether the legislative amendment to section 41.002(c) has altered our inquiry for determining whether a homestead is rural or urban; that is, we determine whether section 41.002(c) has overturned more than 100 years of Texas law to become the exclusive consideration for determining Texas homestead status.

This court's recent decision in *In re Bradley* aids us in the disposition of the present appeal. *In re Bradley*, 960 F.2d 502 (5th Cir. 1992). In *Bradley*, this court addressed a bankruptcy appeal where the creditor challenged the rural characterization of the debtor's homestead property. After a review of Texas homestead law, we acknowledged that, under current law, "[i]t is unclear whether section 41.002(c) applies in all homestead disputes." *Id.* at 511 n. 18. We said that, "[a]t the least the definition of 'homestead' in section 41.002(c) applies in cases, like [*Bradley*], involving the threatened foreclosure of homestead property." *Id.* (citation omitted). Accordingly, we determined that, because Bradley's homestead received no utility or other municipal services at the time she began to use the property as her homestead, Bradley was entitled to a rural homestead interest in the property. *Id.* at 511-12.

As we noted in *Bradley*, "section 41.002(c) might not displace the traditional common law definition of 'homestead' in all cases." *In re Bradley*, 960 F.2d 502, 511 n. 18 (5th Cir. 1992). Prior to 1989, we said, the Texas courts

generally examined several factors which were relevant to the determination whether a homestead was urban or rural.[14] We then construed section 41.002(c) to be a clarification of the test to determine homestead status. We did not then, nor do we now, construe section 41.002(c) to be the exclusive test to determine a property's homestead status: it is but one factor a court considers to determine whether the homestead is urban or rural. Therefore, we reject the Blakeman children's contention that a homestead property is urban simply because it is served by municipal utilities or fire and police protection.

The 1980 probate court judgment declared that the property was the rural homestead of C.E. and Mrs. Blakeman and ordered that Mrs. Blakeman have the use and the benefit of the property for so long as she occupied the property as her homestead. The district court found that Mrs. Blakeman continued to occupy the property and that the evidence did not establish that Mrs. Blakeman had abandoned her rural homestead interest in the property. The Blakeman children have not pointed to any contradictious evidence. Accordingly, we hold that the district

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[14] These factors include: "(1) the location of the land with respect to the limits of the municipality; (2) the situs of the lot in question; (3) the existence of municipal utilities and services; (4) the use of the lot and adjacent property; and (5) the presence of platted streets, blocks, and the like." *Id.* at 511-12 n. 18, *citing Vistron Corp. v. Winstead*, 521 S.W.2d 754, 755 (Tex.Civ.App. – Eastland 1975, no writ); *Rockett v. Williams*, 78 S.W.2d 1077, 1078 (Tex.Civ.App. – Dallas, 1935, writ dism'd); *Purdy v. Grove*, 35 S.W.2d 1078, 1081-82 (Tex.Civ.App. – Eastland 1931, writ ref'd); 43 Tex.Jur.3d *Homesteads* § 15 (1985).

court was not clearly erroneous in concluding that Mrs. Blakeman's homestead interest in the property was rural.

C

The district court, finding that Mrs. Blakeman's homestead interest was the economic equivalent of a life estate, used the Treasury tables set forth in Treasury Regulation § 20.2031-10(f),[15] to determine its value.[16] The district court measured the value of the estate as of the date of the tax assessment and determined that the value of Mrs. Blakeman's homestead estate (life estate) was 74.423 percent of the total value of the 100 acres. The district court then held the government's lien attached only to the estate's remainder interest in the 100 acres and held the remainder interest was worth 25.577 percent of the value of the homestead as of the date of the assessment.[17] The district court, however, found that "inequity would result if Mrs. Blakeman were to . . . have the use of the homestead for the ten years that have

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[15] *See* 26 C.F.R. § 20.2031-10(f).

[16] The court found that the parties agreed that "the value of Mrs. Blakeman's homestead estate is the economic equivalent of a life estate and that use of the tables set forth in Treas.Reg. § 20.2031-10(f) in determining the value of said estate is appropriate." Memorandum Opinion at 222.

[17] The court so reasoned because "the general federal tax lien described in 26 U.S.C. § 6321 and on which federal levy may be had under 26 USC § 7403(a) attaches only to the interest of the delinquent taxpayer in particular property and not to the entire property." Memorandum Opinion at 222, *citing United States v. Rodgers*, 461 U.S. 677, 690, 103 S. Ct. 2132, 2141, 76 L.Ed.2d 236 (1983). This amount represents 14.071 percent.

passed since date of assessment, as she has had, and at the same time to receive sales proceeds representing the value of the homestead life estate for that same ten-year period, and" concluded that Mrs. Blakeman's interest in the 100 acres should be determined by the value of Mrs. Blakeman's homestead interest as of the present date. Using the Treasury tables, then, the district court found Mrs. Blakeman's interest in the property to be 60.352 percent of the value of the land as of judgment. The district court then determined that the difference, between the 74.423 percent representing the value of Mrs. Blakeman's homestead estate at date of assessment (June 17, 1980) and the 60.352 percent (Mrs. Blakeman's interest at judgment), should be given to the estate.[18]

The government argues that Mrs. Blakeman's interest in the Randol Mill Property should be valued as of the foreclosure date and contends that the district court erred in holding that the government's tax lien was limited to the estate's interest in the property on the lien's attachment date. Mrs. Blakeman, on the other hand, argues that the district court should have determined the interests of the respective parties as of the date the lien arose. In the alternative, Mrs. Blakeman argues that if her homestead interest is to be valued as of the foreclosure date, it should be valued under the tables promulgated pursuant to 26 U.S.C. § 7520, and the district court erred in using the tables under Treas. Reg. § 20.2031-10.[19]

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[18] *See* Memorandum Opinion at 222.

[19] Federal district courts in tax foreclosure cases are authorized to order a sale of the homestead property and distribute the sale proceeds in accordance with the interests of the parties.

Mrs. Blakeman contends that she is entitled to at least 74.423 percent of the gross proceeds realized from the sale of the homestead property without any reduction to account for the period she occupied the property. Mrs. Blakeman relies on *Harris v. United States*, 764 F.2d 1126 (5th Cir. 1985), contending that the government should be estopped from asserting a position contrary to that taken in *Harris*. We find Mrs. Blakeman's contention without merit.

It is well-settled that a federal tax lien reaches property and interests in property owned by the taxpayer on the date of the assessment, as well as property and interests in property acquired by the taxpayer from that date until the tax debt is satisfied. *See Texas Commerce Bank-Fort Worth v. United States*, 896 F.2d 152, 161 (5th Cir.1990) ("The lien arises on the date the IRS *assesses* unpaid taxes, applies to currently owned as well as after-acquired property, and continues until the taxpayer satisfies the debt or the statute of limitations runs."), *citing* 26 U.S.C. § 6322; *Glass City Bank v. United States*, 326 U.S. 265, 267, 66 S.Ct. 108, 110, 90 L.Ed. 56 (1945); *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244 (10th Cir. 1989); *Prewitt v. United States*, 792 F.2d 1353, 1355 (5th Cir. 1986); *see also Rice Investment Co. v. United States*, 625 F.2d 565, 568 (5th Cir. 1980) ("After-acquired property . . . is reached by the lien.") (citations omitted). Therefore, the federal tax lien

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See 26 U.S.C. § 7403(c). Section 7403(c) does not, however, provide a precise method of (1) valuing the interests of the parties to the foreclosure and (2) distributing the sales proceeds realized on the foreclosure sale. *Id.*

reaches the interests of C.E.'s estate as of the date of the foreclosure sale.

Mrs. Blakeman's next argument is that, if her homestead interest is to be valued as of the foreclosure date, her interest should be valued according to the tables promulgated pursuant to 26 U.S.C. § 7520.[20] The government agrees that the tables promulgated pursuant to 26 U.S.C. § 7520 are the proper tables to determine Mrs. Blakeman's interest in the property, but argues that, because Mrs. Blakeman failed to properly raise the issue of the applicability of section 7520 in the district court, she has waived her right to assert that the district court should have used the tables promulgated pursuant to 26 U.S.C. § 7520. We agree.

This court generally will not address a claim on appeal that was not properly raised in the trial court. *See Savers Federal Sav. & Loan Ass'n v. Reetz*, 888 F.2d 1497, 1501 & n. 5 (5th Cir. 1989); *United States v. Indiana Bonding & Sur. Co.*, 625 F.2d 26, 29 (5th Cir. 1980). In *Indiana Bonding*, we declined to review an issue on appeal because the defendant failed to affirmatively plead it, and failed to list it in its proposed findings of facts and conclusions of law or at trial, despite the fact that the defendant had listed this issue as one of its contentions in the pretrial order. *See Indiana Bonding*, 625 F.2d at 29. In contrast, in *Batiansila v. Advanced Cardiovascular Systems, Inc.*, 952 F.2d 893, 896 (5th Cir. 1992), we found that the

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[20] Mrs. Blakeman contends that the district court erred when it stated that she agreed that the tables under Treas.Reg. § 20.2031-10 should be used to determine the extent of her homestead interest.

defendant had not waived its right to present an argument where it listed this issue as a contested issue of fact in the pretrial order, the defendant orally requested, but was denied, an opportunity to brief the issue, and also elicited testimony at trial regarding the issue. *See id.*

We find that Mrs. Blakeman did not properly urge the applicability of section 7520 to the district court and, therefore, she has waived her right to raise on appeal the propriety of using the tables promulgated under 26 U.S.C. § 7520 for valuation purposes.[21] Mrs. Blakeman

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[21] In Mrs. Blakeman's brief supporting her motion for partial summary judgment, she stated that, "as a matter of law, the value of her life estate (homestead interest) in the Homestead Property should be determined by the use of the tables set forth January 8, 1990 in Treasury Regulation Sections 20.2031.10(a) and (f)." *See* Record on Appeal, Vol. I at 132, *United States v. Blakeman*, 750 F.Supp. 216 (5th Cir.1991). The district court denied Mrs. Blakeman's motion and the parties subsequently attended a pretrial conference in order to narrow the issues for trial. The pretrial order listed as a contested issue of law whether Mrs. Blakeman's homestead interest should be measured as of the date of death of C.E. Blakeman or the date of the sale of the Randol Mill Property. *See* Record on Appeal, Vol. 2 at 444. In response to the district court's order directing the parties to submit briefs with respect to the proper date of valuation and how to value Maudine's interest, Mrs. Blakeman submitted a memorandum of law wherein she asserted that her interest should be determined as of the date of C.E.'s death and that the tables set forth in the Treasury Regulations should be used. *See* Record on Appeal, Vol. 2 at 538-39. The government responded to the district court's directive by submitting a brief wherein the government agreed "that the value of the Maudine Blakeman's life estate (homestead interest) should be determined by the use of the tables set forth in Treasury Sections 20.2031.10(a) and (f)." *Id.* at 520. Mrs. Blakeman's response in opposition to the government's brief did not discuss the proper tables to be used to

failed to: (1) affirmatively plead; (2) list as a contested issue in her pretrial order; (3) brief; (4) elicit testimony, or (5) argue to the district court the applicability of section 7520. Although Mrs. Blakeman, in her proposed findings of fact and conclusions of law, submitted one week prior to trial, mentions that section 7520 should be used in the event the district court valued her interest at the time of the foreclosure sale, she effectively abandoned her conditional argument by not raising it at trial. There is nothing in the record to suggest that Mrs. Blakeman addressed the applicability of section 7520 at trial. To be preserved for appeal, we require something more than an intimation of an argument in a party's proposed findings of fact and conclusions of law. *See Indiana Bonding & Surety Co.*, 625 F.2d at 29; *cf. Batiansila*, 952 F.2d at 896. Accordingly, we find that Mrs. Blakeman waived her right to assert that the tables promulgated under section 7520 should be used.

D

Mrs. Blakeman argues that she is entitled to compensation for taxes she will pay due to the sale of her homestead property. Mrs. Blakeman did not raise this issue in the district court, but she contends on appeal that

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determine her interest in the Randol Mill Property. *See* Record on Appeal, Vol. 3 at 595-98. It was only in her proposed findings of fact and conclusions of law that Mrs. Blakeman suggested, for the first time, that, if the proper valuation date was the date of sale, then her interest should be determined under the tables issued pursuant to 26 U.S.C. § 7520. *See* Record on Appeal, Vol. 4 at 866-67.

Gibson v. United States, 761 F.Supp. 685 (C.D.Cal. 1991), presents new law warranting this court's examination of the question whether she should be compensated for the tax consequences of selling the homestead property.

We generally do not allow parties to raise issues for the first time on appeal. *See Colburn v. Bunge Towing*, 883 F.2d 372, 375 (5th Cir. 1989), *citing Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) ("We are reluctant to address for the first time on appeal alleged errors, which the trial court was not given an opportunity to consider and correct"). We make an exception to this general rule, however, when this prohibition would result in a "substantial miscarriage of justice." *Id.*

The government argues that a substantial miscarriage of justice would not result if Mrs. Blakeman was prohibited from raising this assertion for the first time on appeal.[22] We are not persuaded that our refusal to allow Mrs. Blakeman to raise this issue on appeal would result in a substantial miscarriage of justice. Indeed in her brief, Mrs. Blakeman cites a case from the Second Circuit which, she argues, stands for the proposition that the costs and expenses attendant to section 7403 judicial foreclosure proceedings may be shifted to the government in order to make innocent third parties whole. *See* Reply Brief for Maudine Blakeman at 10, *United States v. Blakeman*, 750 F.Supp. 216 (5th Cir. 1991), *citing United States v. 110-118 Riverside Tenants Corp.*, 886 F.2d 514 (2d Cir. 1989),

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[22] Moreover the government argues, there is nothing in 26 U.S.C. § 7403 or its legislative history to suggest that a nonliable third party's tax liability should be paid out of the proceeds of a foreclosure sale.

cert. denied, 495 U.S. 956, 110 S. Ct. 2560, 109 L.Ed.2d 743 (1990). We see no reason why Mrs. Blakeman could not at least have presented in the district court her position that, pursuant to 26 U.S.C. § 7403, the district court could require the government to pay the costs and expenses attendant to the judicial foreclosure. Accordingly, we will not consider Mrs. Blakeman's untimely assertion.

III

For the foregoing reasons, we AFFIRM in part and REVERSE and REMAND in part for the district court to determine the government's interest in the Randol Mill Property as of the date of the foreclosure sale, in accordance with the tables set forth in the Treasury Regulations.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	CIVIL ACTION NO.
VS.	§	CA4-86-511-A
	§	
JAMES NEAL BLAKEMAN AS EXECUTOR OF THE ESTATE OF C. E. BLAKEMAN, DECEASED, ET AL	§	

MEMORANDUM OPINION

(Filed Oct. 30, 1990)

This action was brought by the United States of America (hereinafter "plaintiff") to reduce to judgment the assessment of certain federal estate tax liabilities of the estate of C. E. Blakeman, deceased ("the estate"); to foreclose plaintiff's federal tax lien(s) against certain real property (hereinafter described) located in Fort Worth, Tarrant County, Texas; and to obtain judgment against defendant James Neal Blakeman, as executor of the estate and individually, for the estate taxes to the extent of all payments of debts of the estate, and, against the survivors of C. E. Blakeman based on the value of any assets they might have received from the estate.

Defendant Maudine Blakeman (hereinafter "Mrs. Blakeman") is the widow of C. E. Blakeman; defendants James Neal Blakeman, Robert Earl Blakeman, and Karren A. Whaley (hereinafter "defendant children") are the children of C. E. Blakeman by a previous marriage; defendant Keep Fresh Filters, Inc., d/b/a Diversified Financial

Planners, Inc., formerly NCNB, formerly known as Ridglea Bank, (hereinafter "Keep Fresh") is a judgment creditor of the estate; and defendants Tarrant County, Texas, Fort Worth Independent School District and City of Fort Worth, Texas, (hereinafter "defendant taxing authorities") are taxing entities to whom ad valorem taxes, penalties and interest are due and owing by the estate.

The primary dispute in this case centers around 101.5954 acres of land that was owned by C. E. Blakeman as his separate property at the time of his death. A legal description of this land is given in Exhibit "A" to the judgment in this action that bears the same date as this memorandum opinion. This acreage will be referred to herein as the "Randol Mill property."

At the time of his death, C. E. Blakeman and defendant Mrs. Blakeman resided upon the Randol Mill property. Thereafter, Mrs. Blakeman continued to reside on a 100 acre part of the Randol Mill property. C. E. Blakeman left the property to the defendant children by his last will and testament. A dispute arose between Mrs. Blakeman and defendant children as to the rights of each in the Randol Mill property. Suit, to which they were all parties, was brought in Probate Court in Tarrant County, Texas, to determine their respective rights, and on May 7, 1980, a final judgment was entered. The judgment determined that Mrs. Blakeman had a rural homestead in the Randol Mill property and that she was entitled to the use of 100 acres, to be selected by her, of the Randol Mill property for so long as she occupies the same as her homestead. Neither plaintiff nor defendant Keep Fresh or any of the taxing authorities was a party to the Probate Court action.

The Contentions of the Parties Relative to the Randol Mill Property

The contentions of the parties relative to the Randol Mill property are, briefly, as follows:

Plaintiff contends that the Randol Mill property is encumbered with a special federal estate tax lien pursuant to 26 U.S.C. §6324(a)(1), as well as a general federal tax lien pursuant to 26 U.S.C. §6321, to secure payment of the federal estate tax liability of the estate and that plaintiff is entitled to foreclosure of its liens.

Mrs. Blakeman contends that plaintiff's special federal estate tax lien has expired because more than ten years have passed since the date of C. E. Blakeman's death, and, further, that plaintiff's complaint fails to state a claim based on 26 U.S.C. §6321. She claims in the alternative that, if the Court finds that plaintiff's complaint is sufficient to state a claim under §6321, she continues to have a rural homestead in 100 acres of the Randol Mill property and that, if the Court orders foreclosure of the property, she is entitled to recover the economic equivalent of a life estate in the 100 acres that she selected as her homestead pursuant to the authority of the May, 7, 1980, Probate Court judgment. Specifically, Mrs. Blakeman claims that she is entitled to 74.432 percent of the proceeds of any foreclosure sale of the 100 acres.

Defendant children do not contest that the Randol Mill property is encumbered with a general federal tax lien or that plaintiff is entitled to foreclose the tax lien. They contend that Mrs. Blakeman now has only an urban

homestead interest, rather than a rural homestead interest, in the Randol Mill property. Put another way, defendant children claim that Mrs. Blakeman is entitled only to the use of one acre of the Randol Mill property and that, upon foreclosure of the property, they will be entitled to receive the bulk of the proceeds after payment of the outstanding debts of the estate. However, the defendant children join with Mrs. Blakeman in contending that plaintiff's lien rights are subject and inferior to whatever homestead rights Mrs. Blakeman had in the Randol Mill property when the estate tax assessments were made.

Keep Fresh and defendant taxing authorities do not dispute the validity of plaintiff's general federal tax lien or its right to a judgment of foreclosure. These defendants merely seek a determination of the priority of their liens, if any, against the Randol Mill property and recovery from the sales proceeds of the sums due and owing to them in the event a foreclosure sale is ordered.

Stipulations

Prior to trial, the parties stipulated to the following facts:

> 1. C. E. Blakeman died on May 25, 1978, in Fort Worth, Tarrant County, Texas, while married to Mrs. Blakeman, and that he was survived by three children from a prior marriage, who are defendant children.
>
> 2. C. E. Blakeman left a will dated January 18, 1973, which appointed James Neal Blakeman as independent executor, and which was admitted to probate by order dated June 12, 1978.

3. James Neal Blakeman was appointed independent executor of the estate by Probate Court order dated June 12, 1978; on or about June 12, 1978, he executed and filed with the Probate Court an oath that he would well and truly perform the duties of the executor of the estate; he was issued letters testamentary as independent executor of the estate by the Probate Court; and, he, as independent executor of the estate, filed an inventory, appraisement and list of claims with the Probate Court on or about November 10, 1978, which was approved by the Probate Court, by order dated November 27, 1978.

4. On the date of his death, C. E. Blakeman owned the Randol Mill property, consisting of over 100 acres of land located in Fort Worth, Texas.

5. The Randol Mill property was the separate property of C. E. Blakeman and was included in the estate.

6. The will of C. E. Blakeman left all real property of his estate, including the Randol Mill property, to defendant children, who are the sole beneficiaries of the estate and will of C. E. Blakeman, in equal shares, share and share alike.

7. On May 7, 1980, the Probate Court entered a final judgment declaring that the Randol Mill property was the rural homestead of C. E. Blakeman and Mrs. Blakeman. The Probate Court's judgment ordered that Mrs. Blakeman have the use and benefit of 100 acres of the Randol Mill property for so long as she shall occupy the same as her homestead. Plaintiff was not made a party to the Probate Court action

between Mrs. Blakeman and defendant children that resulted in the Probate Court's judgment.

8. A delegate of the Secretary of the Treasury made assessments against the estate of C. E. Blakeman on June 17, 1980, in the amount of $124,820.93 for federal estate taxes and $12,651.37 interest. On July 21, 1980, the Secretary of the Treasury assessed penalties and interest in the amounts of $31,205.23 and $1,395.26, respectively. On August 18, 1980, the Secretary of the Treasury assessed interest in the amount of $1,436.30. A payment received April 25, 1983, reduced the outstanding balance of the assessments to $121,522.34. An abatement of a delinquency penalty reduced the outstanding balance of the assessments to $90,495.65 as of July 21, 1980.

9. The assessments were made on the basis of a return prepared by the Internal Revenue Service and agreed to by defendant James Neal Blakeman as executor of the estate.

10. On March 16, 1981, a notice of federal tax lien for the assessment against the estate of C. E. Blakeman was filed with the Tarrant County Clerk.

11. The Internal Revenue Service made demand upon defendant James Neal Blakeman, as executor of the estate, for payment of federal estate taxes due and owing from the estate prior to the filing of the complaint.

12. The complaint was filed on June 16, 1986.

13. James Neal Blakeman, as executor of the estate, has failed to pay the federal estate tax

liability due and owing from the estate. There were insufficient funds to do so.

14. Mrs. Blakeman has continuously resided on the Randol Mill property since the death of C. E. Blakeman.

15. Mrs. Blakeman, who was born on June 20, 1928, was forty-nine years old at the date of death of C. E. Blakeman and is currently sixty-two years old.

16. As of October 9, 1990, the unpaid balance of the federal estate tax, interest and statutory additions due and owing to plaintiff United States of America from the estate of C. E. Blakeman, deceased, is $350,627.24.

17. As of October 1, 1990, the unpaid balance of ad valorem taxes, penalty, and interest due and owing to defendant taxing authorities from the estate is $27,731.13. This sum includes interest and penalty through October 31, 1990.

18. As of October 8, 1990, the aggregate unpaid balance of principal, interest, and attorney's fees due and owing by the estate to Keep Fresh pursuant to a judgment signed March 28, 1980 (in favor of Ridglea Bank, as plaintiff and against James Neal Blakeman, executor, as defendant) in Cause No. 48-55927-79 in the 48th District Court of Tarrant County, Texas is $96,865.89. Defendant Keep Fresh is the current owner and holder of the March 28, 1980, judgment.

19. All parties except plaintiff have agreed and stipulated that Keep Fresh, through its predecessors, duly perfected a judgment lien against the Randol Mill property by filing an abstract of judgment on May 30, 1980.

The Court adopts each of the stipulated facts, as set forth above, as a finding of fact by the Court.

The case was tried to the Court, without a jury, on October 11, 1990. Plaintiff and all defendants appeared by and through their respective attorneys of record. Mrs. Blakeman and the defendant children also appeared in person. The Court, having considered the record in this case and the evidence presented, has reached the additional findings and conclusions that are contained in the parts of this Memorandum Opinion that follow.

The Special Federal Estate Tax Lien has Expired but Plaintiff's General Tax Lien has Been Sufficiently Pleaded

C. E. Blakeman died May 25, 1978, and more than ten years have passed since the date of his death. As a matter of law, the special federal estate tax lien described in 26 U.S.C. §6324(a)(1) has expired. *United States v. Potemken*, 841 F.2d 97 (4th Cir. 1988). Contrary to plaintiff's argument, the phrase "or becomes unenforceable by reason of lapse of time," as used in §6324(a)(1), operates only to shorten the duration of the special lien, not to lengthen it.

Although it is not drawn as articulately as might be desired, plaintiff's complaint constitutes a claim to foreclose on the general federal tax lien described in 26 U.S.C. §6321 and is sufficient to give defendants notice of such a claim. *Conley v. Gibson*, 355 U.S. 41, 47, 48 (1957).

Requirements of the general tax lien include: (a) assessment within three years after a return is filed and (b) collection begun within six years of assessment. 26 U.S.C. §6501(a); 26 U.S.C. §6502(a). The parties have stipulated that the following assessments were made:

June 17, 1980	$124,820.93	estate taxes
	$ 12,651.37	interest
July 21, 1980	$ 31,205.23	penalties
	$ 1,395.26	interest
August 18, 1980	$ 1,436.30	interest

As a result of a payment and the abatement of a delinquent penalty, which was stipulated, the balance of the assessments due was $90,495.65 as of July 21, 1980. There is apparently no dispute that the assessments were timely and the Court so finds. The parties have further stipulated, and the Court finds, that on March 16, 1981, plaintiff filed a notice of federal tax lien with the Clerk of Tarrant County, Texas; that plaintiff made demand on defendant James Neal Blakeman, as executor of the estate of C. E. Blakeman, deceased; that the taxes were not paid; and that plaintiff filed its complaint June 16, 1986. Accordingly, the Court finds that plaintiff's suit to enforce its general tax lien was timely filed.

Nature and Extent of the Homestead Claimed by Mrs. Blakeman

Texas law is clear that each spouse in a marriage has a separate and undivided possessory interest in the homestead, which is only lost by death or abandonment. Tex. Const. Art. XVI, §52; *United States v. Rodgers*, 461 U.S. 677, 685 (1983). The homestead right is not a mere statutory entitlement, but a vested property right. *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978). Upon the death of one spouse, the survivor has the same homestead rights (except as to size of a rural homestead) as both spouses had prior to the death of one and is entitled to use and occupy the homestead, even though it was the separate

estate of the deceased. *Hunter v. Clark*, 687 S.W.2d 811, 815 (Tex. App. – San Antonio 1985, no writ). The right of the survivor vests immediately upon the death of the spouse and continues unless abandoned. *Id.*

A Texas homestead can be either rural or urban. Tex. Prop. Code Ann. §41.002 (Vernon Supp. 1990). If urban, it cannot amount to more than one acre of land, with improvements thereon; and, if rural, it cannot total more than 200 acres of land, with improvements thereon, for a family, or 100 acres, with improvements thereon, for a single adult person who is not otherwise entitled to a homestead. *Id.*

The evidence in this action establishes, and the Court finds, that:

1. Until the death of C. E. Blakeman, the Randol Mill property was the rural homestead of C. E. Blakeman and Mrs. Blakeman.

2. At all times since the death of C. E. Blakeman, Mrs. Blakeman has continued to use, occupy and claim at least a 100-acre part of the Randol Mill property as her homestead.

3. The 100-acre part of the Randol Mill property Mrs. Blakeman selected as her homestead pursuant to the May 7, 1980, Probate Court judgment is legally described in Exhibit "B" to the judgment in this action that bears the same date as this memorandum opinion. This 100 acres is hereinafter called the "100 acres."

4. Mrs. Blakeman has never abandoned the 100 acres as her rural homestead.

5. The 100 acres has been the homestead of Mrs. Blakeman at all times since the death of C. E. Blakeman.

Courts that have considered the abandonment of homestead rights have likened abandonment to waiver, i.e., the intentional release, relinquishment or surrender of a right. *Hunter*, 687 S.W.2d at 815. So long as the surviving spouse has no actual intent to abandon his or her homestead rights, even conveyances that are otherwise void do not extinguish those rights. *In re Moody*, 862 F.2d 1194, 1201 (5th Cir. 1989). Abandonment is an affirmative defense that must be proven by clear, conclusive and undeniable evidence. *Taylor v. Mosty Bros. Nursery, Inc.*, 777 S.W.2d 568, 569 (Tex. App. – San Antonio 1989, no writ); *Farrington v. First National Bank*, 753 S.W.2d 248, 251 (Tex. App. – Houston [1st Dist.] 1988, writ denied); *McFarland v. Rousseau*, 667 S.W.2d 929, 931 (Tex. App. – Corpus Christi 1984, no writ). Once the initial homestead character of property is established, the homestead status is presumed to continue. *In re Niland*, 825 F.2d 801, 808 (5th Cir. 1987).

The evidence in this case does not establish that Mrs. Blakeman has lost her rural homestead interest in the 100 acres for any reason.

Share of Sales Proceeds Allocable to Mrs. Blakeman's Homestead Estate

The parties have agreed, and the Court finds, that the value of Mrs. Blakeman's homestead estate is the economic equivalent of a life estate and that use of the Treasury tables set forth in Treas. Reg. §20.2031-10(f) in

determining the value of said estate is appropriate. The effect of Mrs. Blakeman's homestead interest in the 100 acres is that she has, and has had at all times since her husband's death, a life estate in those acres, with the remainder interest being vested in the estate. *Rodgers*, 461 U.S. at 686. The value of Mrs. Blakeman's homestead estate (life estate), measured as of date of tax assessment, was 74.423 percent of the total value of the 100 acres.

Plaintiff's lien attached only to the estate's remainder interest in the 100 acres. Therefore, plaintiff's share, subject to any prior lien claims of creditors of the estate, of the proceeds to be realized from foreclosure of its lien on the 100 acres shall be only 25.577%. This is so because the general federal tax lien described in 26 U.S.C. §6321 and on which federal levy may be had under 26 U.S.C. §7403(a) attaches only to the interest of the delinquent taxpayer in particular property and not to the entire property. *Rodgers*, 461 U.S. at 690. The lien attaches as of the date of assessment, June 17, 1980. 26 U.S.C. §6322. In this case, the delinquent taxpayer is the estate of C. E. Blakeman, deceased. As of the date of assessment of the taxes, the estate had only a remainder interest in the 100 acres. The remainder interest was worth 25.577% of the value of the homestead, because Mrs. Blakeman was fifty-one years old at the date of assessment.

However, the sharing between Mrs. Blakeman and the estate in the 100 acres should be determined by the value of Mrs. Blakeman's homestead estate as of the present date. This is so because inequity would result if Mrs. Blakeman were to be permitted to have the use of the homestead for the ten years that have passed since date of assessment, as she has had, and at the same time

to receive sales proceeds representing the value of the homestead life estate for that same ten-year period. In other words, she should not be permitted to realize twice the benefits of the homestead for the ten years since date of assessment.

Pursuant to the Treasury tables, the value as of the present time of Mrs. Blakeman's homestead estate (life estate) in the 100 acres is 60.352 percent of the value of the land. Thus, her share of proceeds from foreclosure sale of the 100 acres would be 60.352 percent. The difference between the 74.423 percent that represents the value of the homestead estate at date of assessment and the 60.352 percent shall be received by the estate, to be disposed of in administration of the estate under state law.

The Claims of Keep Fresh

The Court has determined that Keep Fresh is not entitled to direct payment of the proceeds of the two foreclosure sales described herein. Pursuant to Tex. Prop. Code §52.006 (Vernon 1984), the duration of a judgment lien is ten years following the date of recording and indexing the abstract of judgment. In this case, an abstract of judgment was filed by Keep Fresh's predecessor May 30, 1980; therefore, the judgment lien would have expired in May 1990 unless extended. Although the record supports a finding that defendant Keep Fresh's lien was duly perfected by filing an abstract and by obtaining the issuance of a writ of execution within ten years of the date of judgment, there is no evidence that Keep Fresh's judgment lien is still viable.

Plaintiff and all other defendants stipulated that Keep Fresh is the owner and holder of a judgment against the estate and that the amount due and owing as of October 8, 1990, is $96,865.89. The record establishes that an abstract of judgment was filed of record in Tarrant County, Texas, within one year of the date of judgment and that a writ of execution was issued within ten years of the date of judgment. Thus, Keep Fresh's judgment lien was duly perfected and the judgment itself has been kept alive. Tex. Civ. Prac. & Rem. Code §34.001 (Vernon 1986); *Hicks v. First National Bank*, 778 S.W.2d 98, 100 (Tex. App. – Amarillo 1989, writ denied); *Cox v. Nelson*, 223 S.W.2d 84 (Tex.Civ.App. – Texarkana 1949, writ ref'd). However, though the judgment is still alive, there is no evidence that the judgment lien against the Randol Mill property was kept alive by refiling of the abstract. Tex. Prop. Code §52.001; *Burton Lingo Co. v. Warren*, 45 S.W.2d 750, 753 (Tex.Civ.App. – Eastland 1931, writ ref'd). Nevertheless, Keep Fresh should be able to assert against the estate any rights it has as a judgment creditor of the estate.

The Claims of the Taxing Authorities

Though the parties stipulated that as of October 1, 1990, the unpaid balance of the ad valorem taxes, penalty and interest due and owing to defendant taxing authorities from the estate is $27,731.13, there is no stipulation or proof that these ad valorem taxes, etc., were assessed or owed as to, or against, the Randol Mill property. For all that is shown from the record, the ad valorem taxes owed to defendant taxing authorities could have accrued because of taxes assessed against property entirely different from the Randol Mill property, which could have been

owned by C. E. Blakeman prior to his death. As a consequence, the Court is not allowing defendant taxing authorities to participate directly in the proceeds of the foreclosure sales described in this memorandum opinion. However, the taxing authorities should be able to assert, under state law, against the estate any rights they have as judgment creditors of the estate.

Foreclosure and Application of Proceeds of Sale

Defendant children argue, in their post-trial brief, that this Court does not have to order the foreclosure of the Randol Mill property, or, alternatively, that the property should be put on the market for a reasonable length of time. In support of this proposition, defendant children cite to *United States v. Boyd*, 246 F.2d 477 (5th Cir.), cert. denied, 355 U.S. 889 (1957); *United States v. National Bank of Commerce*, 472 U.S. 713 (1985); and *United States v. Rodgers*, 461 U.S. 677 (1983). The exceptions to forced sale described in the *Boyd* case are inapposite. Likewise, the *National Bank of Commerce* case is not governing because it is a levy case and not a foreclosure case. Finally, although the *Rodgers* case indicates that a court may sometimes refuse to order foreclosure, the Supreme Court emphasizes "that the limited discretion accorded by §7403 should be exercised rigorously and sparingly, keeping in mind the Government's paramount interest in prompt and certain collection of delinquent taxes." 461 U.S. at 711.

In this case, the parties have not presented evidence to support the exercise of the Court's discretion not to order foreclosure. Accordingly, the Court will order foreclosure of the Randol Mill property. The Court will first

order foreclosure sale of the 1.5954 acres in which Mrs. Blakeman does not have a homestead interest. The sale is to be conducted within sixty (60) days after the date of signing of this memorandum opinion. The proceeds from the sale of the 1.5954 acres shall first be applied to the reasonable and necessary costs of sale, and then any balance remaining shall be distributed as follows, in the sequence set forth below:

1. First, the balance, if any, shall be used to satisfy the debt of the estate to plaintiff.

2. If any remains, the balance shall be paid to the estate, through its personal representatives.

If the proceeds from the sale of said 1.5954 acres are insufficient to pay the sums due and owing to plaintiff, then the remaining 100 acres of the Randol Mill property shall be sold by foreclosure, which sale, if it is necessary, shall be conducted within one hundred twenty (120) days after the date of signing of this memorandum opinion. The proceeds from the sale of the 100 acres shall be distributed as follows, in the sequence set forth below:

1. Mrs. Blakeman shall receive 60.352% of the sales proceeds.

2. Next, the sales proceeds shall be applied to the reasonable and necessary costs of sale.

3. Next, the debt of the estate to plaintiff shall be paid in full, except that the amount to be received by plaintiff from the proceeds of the second sale shall not in any event exceed 25.577% of the gross proceeds of sale.

4. If any remains, the balance shall be paid to the estate, through its personal representative.

Liability of James Neal Blakeman

The Court previously determined that defendant James Neal Blakeman is personally liable to plaintiff to the extent that he has used funds of the estate to pay debts of the estate. The evidence at trial showed that this defendant paid by use of funds of the estate $13,525.00 to the State of Texas for inheritance taxes. The Court finds that defendant James Neal Blakeman, individually, is liable to plaintiff in the amount of $13,525.00, pursuant to 31 U.S.C. §3713. Defendant James Neal Blakeman, as executor of the estate, is liable to plaintiff in the amount of $350,627.24, as stipulated by the parties as the amount due and owing at time of trial.

Liability of Remaining Individual Defendants

At trial, plaintiff announced that it is no longer seeking judgment against defendants Maudine Blakeman, Robert Earl Blakeman or Karren A. Whaley, individually. Accordingly, the Court finds that plaintiff should take nothing from these defendants.

Distribution to be Made of Sales Proceeds to be Received by the Estate

Because of the joinder of James Neal Blakeman, as executor of the estate of C. E. Blakeman, deceased, as a party to this action, the estate, for practical purposes is a party to the action, through its personal representative.

The Court has concluded that the foreclosure sales to be ordered by the Court could, if accomplished, result in the creation of funds that would be an asset of the estate, against which creditors of the estate, as well as the defendant children as beneficiaries of the estate, might assert claims and interests. These potential claimants include Keep Fresh, defendant taxing authorities and defendant children. The Court is unable to determine from the record in this case whether there are other potential claimants against the estate.

Rather than to involve itself in allocation of the sales proceeds that might be received by the estate pursuant to foreclosure, the Court is providing in the judgment that the excess funds, if any, shall be paid to the estate. Thereafter, all claimants against, and beneficiaries in, the estate can resolve through appropriate state law procedures entitlement to any sales proceeds received by the estate.

Judgment to be Entered

The Court's judgment in accordance with this memorandum opinion shall be set forth in a separate document, signed the same date as the date of signing of this memorandum opinion.

SIGNED this 30th day of October, 1990.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
VS.	§	
	§	CIVIL ACTION
JAMES NEAL BLAKEMAN, AS EXECUTOR OF THE ESTATE OF C. E. BLAKEMAN, DECEASED, ET AL	§	NO. CA 4-86-511-A

JUDGMENT

(Filed Oct. 30, 1990)

Came on for trial before the Court without a jury the above-styled and numbered action. Plaintiff is United States of America, and defendants are James Neal Blakeman, individually and as executor of the estate of C. E. Blakeman, deceased, Maudine Blakeman, Robert Earl Blakeman, Karren A. Whaley, Keep Fresh Filters, Inc., d/b/a Diversified Financial Planners, Inc., formerly NCNB, formerly known as Ridglea Bank, Tarrant County, Texas, Fort Worth Independent School District, and City of Fort Worth, Texas. The Court's findings of fact and conclusions of law are set forth in a separate memorandum opinion signed the same date on which this judgment is being signed.

The Court ORDERS, ADJUDGES and DECREES that:

1. Plaintiff have and recover judgment against defendant James Neal Blakeman, as executor of the estate of C. E. Blakeman, deceased, in the amount of THREE HUNDRED FIFTY THOUSAND SIX HUNDRED TWENTY SEVEN AND 24/100 DOLLARS ($350,627.24),

plus post-judgment interest thereon at the rate of SEVEN AND 78/100 PERCENT (7.78%) per annum from date of judgment until paid.

2. Plaintiff have and recover judgment against defendant James Neal Blakeman, individually, in the amount of THIRTEEN THOUSAND FIVE HUNDRED TWENTY-FIVE AND NO/100 DOLLARS ($13,525.00), plus post-judgment interest thereon at the rate of SEVEN AND 78/100 PERCENT (7.78%) per annum from date of judgment until paid.

3. a. The general federal tax lien of plaintiff is ORDERED foreclosed against all land, together with all improvements thereon, that is included in the property description that is attached hereto as Exhibit "A" and that is not included in the property description that is attached hereto as Exhibit "B" (hereinafter called the "first tract").

b. The Clerk of the Court shall issue an order of sale commanding the United States Marshal to seize and sell the first tract, as a whole, at public auction in accordance with 28 U.S.C. §§2001 and 2002.

c. Notice of the sale shall be published once a week for at least four weeks prior to the sale in the *Fort Worth Star Telegram* and in the *Arlington Citizen Journal*. Said notice shall describe the first tract by statements in the notice that the property to be sold is all property that is included in the property that is described as:

> (The notice shall give at this point the exact description contained in Exhibit "A" to this judgment.)

and that is not included as a part of the property that is described as:

> (The notice shall gave [sic] at this point the exact description contained in Exhibit "B" to this judgment.)

and shall contain the terms and conditions of sale as set forth in this judgment.

c. The sale of the first tract shall occur prior to expiration of sixty days after the date of signing of this judgment.

d. The terms and conditions of the sale shall be as follows:

> (1) The property shall be sold as a whole at public sale at the courthouse door, south entrance of the Tarrant County Courthouse (the original Tarrant County courthouse building), Fort Worth, Texas.
>
> (2) The terms of sale shall be cash. The successful bidder, called purchaser herein, shall be required to deposit with the United States Marshal cash equal to twenty percent of his total bid immediately upon the property being struck off and awarded to him as the highest and best bidder, and the remaining eighty percent of said purchase price shall be paid on or before 5:00 p.m. on the date five days from the date of sale. Should any person bid off property at sale by virtue of this judgment and order of sale and fail to comply with the terms of the sale, he shall be liable to the plaintiff for twenty percent of the value of the property thus bid off as a penalty, in addition to costs and expenses. Said penalty shall be recovered on motion, five days' notice

of such motion being given to such purchaser; and said deposit by purchaser shall be paid over and delivered to plaintiff to be applied toward payment of said penalty. Payment of said penalty by purchaser shall be a credit on the judgment of plaintiff against defendant James Neal Blakeman as executor of the estate. Should the property on second sale bring less than on the former, the defaulting purchaser at first sale shall be liable to pay the defendants at judicial sale all loss which they sustain, including the amount of the difference between the bid at the first sale and the bid under which the property finally sold, to be recovered on motion.

(4) The United States Marshal shall make his report of sale within ten (10) days from the date of sale.

(5) If no objections have been filed in writing in this action with the Clerk of the Court by 10:00 a.m., fifteen (15) days from the date of sale, the sale shall be confirmed without necessity of motion, or upon motion of the plaintiff, the purchaser, any party in interest in this cause, or by the Court upon its own motion, and the United States Marshal shall be directed to deliver his deed without warranty to said purchaser.

e. The United States Marshal shall apply the proceeds of the sale of the first tract first to reasonable and necessary costs of sale, then to satisfaction of plaintiff's judgment as set forth in paragraph 1 herein. If the property shall sell for more than is sufficient to pay off and satisfy said sums of money, then the Marshal shall pay over the excess to the estate of C. E. Blakeman, deceased, through its personal representative.

4. a. If the proceeds of the sale of the first tract, as ordered above, are not sufficient to satisfy the expenses of sale and the amounts awarded to plaintiff by paragraph 1 above, the general federal tax lien of plaintiff is ORDERED foreclosed against all land that is described in Exhibit "B" hereto, together with all improvements thereon (hereinafter called the "second tract").

b. The Clerk of the Court shall issue an order of sale commanding the United States Marshal to seize and sell the second tract, as a whole, at public auction in accordance with 28 U.S.C. §§2001 and 2002.

c. Notice of the sale shall published once a week for at least four weeks prior to the sale in the *Fort Worth Star Telegram* and in the *Arlington Citizen Journal*. Said notice shall describe second tract by stating the description contained in Exhibit "B" hereto and shall contain the terms and conditions of sale as set out herein.

d. The sale of the second tract shall occur prior to expiration of 120 days after the date of signing of this judgment.

e. The terms and conditions of the sale shall be as follows:

(1) The property shall be sold as a whole at public sale at the courthouse door, south entrance of the Tarrant County Courthouse (the original Tarrant County courthouse building), Fort Worth, Texas.

(2) The terms of sale shall be cash. The successful bidder, called purchaser herein, shall be required to deposit with the United States Marshal cash equal to twenty percent of his total

bid immediately upon the property being struck off and awarded to him as the highest and best bidder, and the remaining eighty percent of said purchase price shall be paid on or before 5:00 p.m. on the date five days from the date of sale. Should any person bid off property at sale by virtue of this judgment and order of sale and fail to comply with the terms of the sale, he shall be liable to the plaintiff for twenty percent of the value of the property thus bid off as a penalty, in addition to costs and expenses. Said penalty shall be recovered on motion, five days' notice of such motion being given to such purchaser; and said deposit by purchaser shall be paid over and delivered to plaintiff to be applied toward payment of said penalty. Payment of said penalty by purchaser shall be a credit on the judgment of plaintiff against defendant James Neal Blakeman as executor of the estate. Should the property on second sale bring less than on the former, the defaulting purchaser at first sale shall be liable to pay the defendants at judicial sale all loss which they sustain, including the amount of the difference between the bid at the first sale and the bid under which the property finally sold, to be recovered on motion.

(3) The United States Marshal shall make his report of sale within ten (10) days from the date of sale.

(4) If no objections have been filed in writing in this action with the Clerk of the Court by 10:00 a.m., fifteen (15) days from the date of sale, the sale shall be confirmed without necessity of motion, or upon motion of the plaintiff, the purchaser, any party in interest in this cause, or by the Court upon its own motion, and the

United States Marshal shall be directed to deliver his deed without warranty to said purchaser.

f. The United States Marshal shall apply the proceeds of sale of the second tract as follows:

(1) Defendant Maudine Blakeman shall receive 60.352 percent of the gross proceeds of sale;

(2) Next, the reasonable and necessary costs of sale shall then be deducted;

(3) Next, plaintiff's judgment, as set forth in paragraph 1 herein, shall be paid in full, except that the amount received by plaintiff from the sale of the second tract shall not in any event exceed 25.577 percent of the gross proceeds of the sale of such tract; and

(4) The excess, if any, shall be paid by the Marshal to the estate of C. E. Blakeman, deceased, through its personal representative.

5. Plaintiff shall have any and all writs necessary to execute the terms of this judgment.

6. All relief sought by any party to this action that is not granted herein is hereby denied, except that whatever claims have been made against the proceeds of sales that are ordered to be paid to the estate of C. E. Blakeman, deceased, through its personal representative, or for money judgment against such estate or its personal representative, are, except to the extent granted herein, hereby dismissed without prejudice to the assertion of such claims through state law procedures. Each party shall bear court costs incurred by such party.

SIGNED this 30th day of October, 1990.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

LEGAL DESCRIPTION OF 101.5954 ACRES, WHICH IS REFERRED TO IN THE JUDGMENT IN CIVIL ACTION NO. CA4-86-511-A AS "FIRST TRACT"

The subject property is located on the south side of Randol Mill Road approximately one mile east of its intersection with Interstate Highway Loop 820. It is legally described in three tracts as follows:

TRACT NO. 1: Part of the William Linn Survey, Patent No. 316, Volume 25 and part of the James M. Robinson Survey, Patent No. 632, Volume 13, in Tarrant County, Texas, and described as follows:

BEGINNING at a point in the West line of County Road No. 2041, said point being 7 varas West of the Northeast corner of said William Linn Survey;

THENCE West along the North line of said Linn and Robinson Surveys 772-1/2 varas to the point for corner;

THENCE South 751 varas to a point for corner in the North line of the tract of land conveyed by A. B. Rice and wife, C. T. Willoughby, by deed dated February 11th, 1922, and recorded in Volume 693, Page 161, of the Deed Records of said County;

THENCE East along the North line of said Willoughby tract, 210 varas to a point in the West line of the tract conveyed by John Anderson and wife to Natline Witcher by deed dated October 18th, 1911, and recorded in Volume 390, Page 149, Deed Records, of said County;

THENCE North along the west line of said Witcher tract 138 varas to its Northwest corner;

THENCE North 88° 40' East along the North line of said Witcher Tract and along the North line of the tract conveyed to W. L. Jett by H. P. Carver and wife, by deed dated February 11th, 1907, and recorded in Volume 247, Page 182 of the Deed Records of said County, in all 544 varas to a point in the West line of County Road No. 2041. THENCE North with the West line of said road, 200 varas and continuing North 2 degrees 40' East along the West line of said road, 401 varas to the PLACE OF BEGINNING.

SAVE AND EXCEPT an approximate two acre site located in the extreme north central section. Tract No. 1, exclusive of the two acres, contains 85.0414 acres, more or less.

TRACT NO. 2: Being County Tract 1-C out of the J. C. Davis Survey, Abstract No. 423 and containing 14.434 acres, more or less.

TRACT NO. 3: Being County Tract 4A01 out of the W. Masters Survey, Abstract No. 1049 and containing .12 acres, more or less.

TRACT NO. 4: The subject property is a single family residence located at 7500 Randol Mill Road. It is legally

described as being two acres out of the James M. Robinson Survey, Abstract No. 1337, Fort Worth, Tarrant County, Texas;

LEGAL DESCRIPTION OF 100 ACRES, WHICH IS REFERRED TO IN THE JUDGMENT IN CIVIL ACTION NO. CA4-86-511-A AS "SECOND TRACT"

Parts of the James M. Robinson Survey, Abstract No. 1337, the Joseph C. Davis Survey, Abstract No. 423 and the Wm. Linn Survey, Abstract No. 924 all situated about 8 miles north 79 degrees east from the courthouse in Tarrant County, Texas; and embracing a portion of the TRACT NO. 1 and a portion of the TRACT NO. 2 described in the deed to C. E. Blakeman and wife, Mary A. Blakeman recorded in volume 2286, page 247 of the Tarrant County Deed Records and a portion of said Robinson Survey lying between said Tracts.

Beginning at a point in the south line of said Davis Survey and the north line of said Robinson Survey for the southerly southeast corner of said TRACT NO. 2, being 453-3/10 varas (1259-2/10 feet) west of the southeast corner of said Davis Survey.

Thence south 22 degrees 04-1/2 minutes west 143-9/10 feet to a 3/4" pipe in the north line of said TRACT NO. 1.

Thence south 89 degrees-36 minutes east, along the said north line of TRACT NO. 1 through said Robinson Survey and into the said Linn Survey, 771 feet to a 3/4' iron rod,

from which the northeast corner of said TRACT NO. 1 bears south 89 degrees-36 minutes east 482-3/10 feet.

Thence south 250 feet to a 3/4" iron rod.

Thence south 89 degrees-36 minutes east 482-3/10 feet to a 3/4" iron rod in the easterly east line of said TRACT NO. 1 for the west line of Cook's Lane, from which the northeast corner of said TRACT NO. 1 bears north 250 feet.

Thence south, along the easterly east line of said TRACT NO. 1 for the said west line of Cook's Lane, 1417-1/10 feet to a 3/4" pipe for the southeast corner of said TRACT NO. 1.

Thence south 89 degrees 18-1/2 minutes west, along the northerly south line of said TRACT NO. 1 through said Linn Survey and into said Robinson Survey, 1505-4/10 feet to a 2" pipe for a reentrant corner of said TRACT NO. 1.

Thence south no degrees-07 minutes east, along an east line of said TRACT NO. 1, a distance of 381-3/10 feet to a 1/2" galvanized pipe for the southerly southeast corner of said TRACT NO. 1.

Thence south 89 degrees-14 minutes west, along a south line of said TRACT NO. 1, a distance of 581-7/10 feet to a 3/4' iron rod for the southwest corner of said TRACT NO. 1.

Thence north 1 degrees 24-3/4 minutes west, along the west line of said TRACT NO. 1, at 2089-9/10 feet past a 3/4" iron rod for the northwest corner of said TRACT NO. 1, and continue in all 2214-2/10 feet to a 3/4" iron

rod in the south line of said Davis Survey and TRACT NO. 2.

Thence south 89 degrees-49 minutes west, along the said south line of the Davis Survey and said TRACT NO. 2, a distance of 130-2/10 feet to a 3/4" iron rod from which the southerly southwest corner of said TRACT NO. 2 bears south 89 degrees-49 minutes west 308-6/10 feet.

Thence north 11 degrees-28 minutes east, 485-6/10 feet to a 3/4" iron rod.

Thence north 81 degrees 14-1/2 minutes west 86-4/10 feet to a 3/4" iron rod.

Thence north 13 degrees 42 1/2 minutes west 117-4/10 feet to a 3/4" iron rod in a line for the south line of Randol Mill Road.

Thence along said line for the south line of Randol Mill Road:

north 73 degrees-11 minutes east 79 feet;

north 88 degrees-51 minutes east 97-3/10 feet;

south 81 degrees-50 minutes east 98 feet;

south 77 degrees-27 minutes east 98-8/10 feet;

south 74 degrees-42 minutes east 102-3/10 feet;

south 72 degrees-42 minutes east 460-1/10 feet; and

south 72 degrees-33 minutes east 331-4/10 feet to a 1/2" iron road in an easterly line of said TRACT NO. 2.

Thence south 22 degrees 04-1/2 minutes west, along said easterly line of TRACT NO. 2, a distance of 351-7/10 feet

to the place of beginning and containing 100 acres of which 57-41/100 acres are within said Robinson Survey, 12-95/100 acres are within said Linn Survey, and 29-64/100 acres are within said Davis Survey.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-1027

UNITED STATES OF AMERICA,
Plaintiff-Appellant-
Cross-Appellee,

VERSUS

JAMES NEAL BLAKEMAN,
As Executor of the Estate of
C. E. BLAKEMAN, Deceased,
ROBERT EARL BLAKEMAN
and KAREN A. WHALEY,
Defendants-Appellees-
Cross-Appellants and Cross-
Appellees,

RIDGLEA BANK, ET AL.,
Defendants-Appellees,

VERSUS

MAUDINE BLAKEMAN,
Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(Opinion July 21, 5th Cir., 1992, ___ F.2d ___)

(Filed July 28, 1993)

Before JOLLY, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby GRANTED. We hereby WITHDRAW Parts II.C. and III. of our original opinion, ___ F.2d ___ (5th Cir. 1992), and substitute the following:

II

C

The district court, finding that Mrs. Blakeman's homestead interest was the economic equivalent of a life estate, used the Treasury tables set forth in Treasury Regulation § 20.2031-10(f)[15] to determine its value.[16] The district court measured the value of the estate as of the date of the tax assessment and determined that the value of Mrs. Blakeman's homestead estate (life estate) was 74.423 percent of the total value of the 100 acres. The district court then held that the government's lien attached only to the estate's remainder interest in the 100 acres and held that the remainder interest was worth 25.577 percent of the value of the homestead as of the

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[15] *See* 26 C.F.R. § 20.2031-10(f).

[16] The court found that the parties agreed that "the value of Mrs. Blakeman's homestead estate is the economic equivalent of a life estate and that use of the tables set forth in Treas. Reg. § 20.2031-10(f) in determining the value of said estate is appropriate." *United States v. Blakeman*, 750 F. Supp. 216, 222 (N.D. Tex. 1990) ("Memorandum Opinion").

date of the assessment.[17] The district court, however, found that "inequity would result if Mrs. Blakeman were to . . . have the use of the homestead for the ten years that have passed since date of assessment, as she has had, and at the same time to receive sales proceeds representing the value of the homestead life estate for that same ten-year period," and concluded that Mrs. Blakeman's interest in the 100 acres should be determined by the value of Mrs. Blakeman's homestead interest as of the present date. Using the Treasury tables, then, the district court found Mrs. Blakeman's interest in the property to be 60.352 percent of the value of the land as of judgment. The district court then determined that the difference between the 74.423 percent representing the value of Mrs. Blakeman's homestead estate at date of assessment (June 17, 1980) and the 60.352 percent (Mrs. Blakeman's interest at judgment) should be given to the estate.[18]

The government argues that Mrs. Blakeman's interest in the Randol Mill Property should be valued as of the foreclosure date and contends that the district court erred in holding that the government's tax lien was limited to the estate's interest in the property on the lien's attachment date. Mrs. Blakeman, on the other hand, argues that

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[17] The court so reasoned because "the general federal tax lien described in 26 U.S.C. § 6321 and on which federal levy may be had under 26 U.S.C. § 7403(a) attaches only to the interest of the delinquent taxpayer in particular property and not to the entire property." *See Blakeman*, 750 F. Supp. at 222 ("Memorandum Opinion") (citing *United States v. Rodgers*, 461 U.S. 677, 690 (1993)). This amount represents 14.071 percent.

[18] *See Blakeman*, 750 F. Supp. at 222 ("Memorandum Opinion").

the district court should have determined the interests of the respective parties as of the date the lien arose. In the alternative, Mrs. Blakeman argues that, if her homestead interest is to be valued as of the foreclosure date, it should be valued under the tables promulgated pursuant to 26 U.S.C. § 7520, and the district court erred in using the tables under Treas. Reg. § 20.2031-10.[19]

Mrs. Blakeman contends that she is entitled to at least 74.423 percent of the gross proceeds realized from the sale of the homestead property without any reduction to account for the period she occupied the property. Mrs. Blakeman relies on *Harris v. United States*, 764 F.2d 1126 (5th Cir. 1985), contending that the government should be estopped from asserting a position contrary to that taken in *Harris*. We find Mrs. Blakeman's contention without merit.

It is well-settled that a federal tax lien reaches property and interests in property owned by the taxpayer on the date of the assessment, as well as property and interests in property acquired by the taxpayer from that date until the tax debt is satisfied. *See Texas Commerce Bank – Fort Worth v. United States*, 896 F.2d 152, 161 (5th Cir. 1990) ("The lien arises on the date the IRS *assesses* unpaid taxes, applies to currently owned as well as after-

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[19] Federal district courts in tax foreclosure cases are authorized to order a sale of the homestead property and distribute the sale proceeds in accordance with the interests of the parties. *See* 26 U.S.C. § 7403(c). Section 7403(c) does not, however, provide a precise method of (1) valuing the interests of the parties to the foreclosure and (2) distributing the sales proceeds realized on the foreclosure sale. *Id.*

acquired property, and continues until the taxpayer satisfies the debt or the statute of limitations runs."), *citing* 26 U.S.C. § 6322; *Glass City Bank v. United States*, 326 U.S. 265, 267, 66 S. Ct. 108, 110, 90 L. Ed. 56 (1945); *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244 (10th Cir. 1989); *Prewitt v. United States*, 792 F.2d 1353, 1355 (5th Cir. 1986); *see also Rice Investment Co. v. United States*, 625 F.2d 565, 568 (5th Cir. 1980) ("After-acquired property . . . is reached by the lien.") (citations omitted). Therefore, the federal tax lien reaches the interests of C.E.'s estate as of the date of the foreclosure sale.

Mrs. Blakeman's next argument is that, if her homestead interest is to be valued as of the foreclosure date, her interest should be valued according to the tables promulgated pursuant to 26 U.S.C. § 7520.[20] The government agrees that the tables promulgated pursuant to 26 U.S.C. § 7520 are the proper tables to determine Mrs. Blakeman's interest in the property, but argues that, because Mrs. Blakeman failed to raise properly the issue of the applicability of § 7520 in the district court, she has waived her right to assert that the district court should have used the tables promulgated pursuant to 26 U.S.C. § 7520. We disagree.

Mrs. Blakeman raised her argument concerning § 7520 in her proposed findings of fact and conclusions of

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[20] Mrs. Blakeman contends that the district court erred when it stated that she agreed that the tables under Treas. Reg. § 20.2031-10 should be used to determine the extent of her homestead interest.

law, but she did not raise it again at trial.[21] We believe, in light of our decision in *Laney v. Comm'r of Internal Revenue*, 674 F.2d 342 (5th Cir. 1982), and decisions of other courts of appeals, that that was sufficient to preserve Mrs. Blakeman's argument for appeal. In *Laney* the taxpayers urged an issue on appeal which they had not pleaded before the tax court, and which the tax court had not addressed. *See id.* at 351. The Commissioner contended that the taxpayers had waived the argument. *See id.* We held that the argument was not waived, because the taxpayers had included the issue in their trial memo before the tax court. The D.C. Circuit reached a similar

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[21] Mrs. Blakeman's proposed findings and conclusions stated:

> 3. In 1988, congress enacted Section 7520, which is the determining provision for valuing life estates and remainder interests at this time. Section 7520 requires the life estate and remainder to be determined
>
> a. Under the tables prescribed by the Secretary, and
>
> b. By using an interest rate equal to 120% of the Federal midterm rate in effect under Section 1274(d)(1) for the month in which the valuation date falls.
>
> If the date of measurement is the date of foreclosure, then the Federal midterm rate for September 1990 is 8.53%. The second element of the formula is 120% of the Federal midterm rate, which is 10.28%. Table R(1) (located at [paragraph] 311AB of CCH Standard Federal Tax Reporter) for a person age 62 (Maudine Blakeman's current age) at 10.2% reflects a remainder factor of .25532% [sic], and therefore, results in a life estate factor of 74.468% of the gross sale price of the property sold at foreclosure.

Record on Appeal, vol. 4, at 866-67.

result in *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100 (D.C. Cir. 1988), where it held that an unpleaded issue was preserved for appeal by inclusion in memoranda of law submitted to the district court. *See id.* at 1103 n.7. In *Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196 (2d Cir. 1975), the Second Circuit held that an issue was preserved for appeal because it was raised in proposed conclusions of law and in a post-trial memorandum. *See id.* at 1205 n.15. Because in those cases memoranda of law and proposed conclusions of law were adequate to preserve issues for appeal, we conclude that Mrs. Blakeman's proposed findings and conclusions were adequate to preserve her argument under § 7520.

The holding in *United States v. Indiana Bonding & Sur. Co.*, 625 F.2d 26 (5th Cir. 1980), appears at first blush to support a contrary conclusion. In *Indiana Bonding* we held that the defendant, Indiana Bonding and Surety Company ("Indiana"), had waived its statute-of-limitations defense, because "[e]ven though this issue was listed as one of [Indiana's] contentions in the pretrial order . . . Indiana's failure to present evidence in support of the defense before the district court preclude[d] our review of it." *See Indiana Bonding*, 625 F.2d at 29. However, *Indiana Bonding* is distinguishable. Because the issue waived there – whether a cause of action was barred by the statute of limitations – required the presentation of evidence, we recognized Indiana's failure to present evidence as a waiver of the issue.[22] *See id.* ("Indiana's failure

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[22] We do not mean to suggest that, in every case where the admission of evidence is appropriate to the resolution of a disputed issue, failure to elicit testimony leads to waiver of the

to present evidence in support of the defense before the district court precludes our review of it here."). In this case, by contrast, there was no need for Mrs. Blakeman to offer evidence regarding the applicability of § 7520, because the applicability of that section followed automatically from the date of valuation of Mrs. Blakeman's homestead interest.[23] Because it was unnecessary for Mrs. Blakeman to present evidence, we do not recognize her failure to do so as a waiver of her argument. Therefore, the logic of *Indiana Bonding* lacks force here, and we believe that *Laney*, *Kapar* and *Hellenic Lines* offer better guidance for the resolution of this dispute.

Because Mrs. Blakeman did not waive her argument under § 7520, and because the government concedes that § 7520 is applicable, we reverse and remand so that Mrs. Blakeman's homestead interest may be valued according to the tables promulgated pursuant to 26 U.S.C. § 7520.

III

For the foregoing reasons, we AFFIRM in part and REVERSE and REMAND in part for the district court to determine the government's interest in the Randol Mill

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issue. That question is not before us, and we express no opinion on the subject.

[23] Section 7520 applies if the valuation date occurs on or after May 1, 1989. The district court determined that the valuation date was the date of foreclosure, and ordered a foreclosure sale within 120 days of October 30, 1990. Therefore, the valuation date occurred after May 1, 1989, and it automatically followed that § 7520 applied.

Property as of the date of the foreclosure sale, in accordance with the tables set forth in the Treasury Regulations, and for the district court to determine the value of Mrs. Blakeman's homestead interest according to the tables promulgated pursuant to 26 U.S.C. § 7520.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA, Plaintiff	§	
VS.	§	CIVIL NO.
JAMES NEAL BLAKEMAN, as Executor of the Estate of C.E. BLAKEMAN, Deceased, MAUDINE BLAKEMAN, ROBERT EARL BLAKEMAN, KAREN A. WHALEY, RIDGLEA BANK, STATE OF TEXAS, TARRANT COUNTY, TEXAS, FORT WORTH INDEPENDENT SCHOOL DISTRICT and CITY OF FORT WORTH, TEXAS, Defendants	§	4-86-511-K

MOTION OF DEFENDANT, MAUDINE BLAKEMAN, FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

(Filed Jan. 8, 1990)

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Suite 6000
901 Main Street
Dallas, Texas 75202

ATTORNEYS FOR DEFENDANT,
MAUDINE BLAKEMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA, Plaintiff	§	
VS.	§	CIVIL NO.
JAMES NEAL BLAKEMAN, as Executor of the Estate of C.E. BLAKEMAN, Deceased, MAUDINE BLAKEMAN, ROBERT EARL BLAKEMAN, KAREN A. WHALEY, RIDGLEA BANK, STATE OF TEXAS, TARRANT COUNTY, TEXAS, FORT WORTH INDEPENDENT SCHOOL DISTRICT and CITY OF FORT WORTH, TEXAS, Defendants	§	4-86-511-K

MOTION OF DEFENDANT, MAUDINE BLAKEMAN, FOR PARTIAL SUMMARY JUDGMENT

COMES NOW MAUDINE BLAKEMAN, Defendant herein, and respectfully moves the Court as follows:

I.

That the Court enter pursuant to Rule 56 of the Federal Rules of Civil Procedure, a partial Summary Judgment solely on behalf of Defendant, Maudine Blakeman, and against Plaintiff, United States of America, for the relief demanded in the First Amended Answer of

Maudine Blakeman, since the pleadings, depositions of Defendants, Maudine Blakeman and James Neal Blakeman, and affidavit of Defendant, Maudine Blakeman, show that there is no genuine issue as to any material fact and that Defendant, Maudine Blakeman, is entitled to judgment, as a matter of law, on Plaintiff's action against her for unpaid federal estate taxes of the Estate of C.E. Blakeman.

II.

In support of this Motion, Defendant, Maudine Blakeman, submits her Brief, the depositions of Defendants, Maudine Blakeman and James Neal Blakeman, and affidavit of Defendant, Maudine Blakeman.

WHEREFORE, PREMISES CONSIDERED, Defendant Maudine Blakeman prays that upon consideration by the Court she be granted partial Summary Judgment against Plaintiff, United States of America, for the relief demanded in her First Amended Answer and for such other and further relief to which she may be entitled to at law and in equity.

Respectfully submitted,

JACKSON & WALKER

By: /s/ Wm. D. Elliott
Wm. D. Elliott

901 Main Street, Suite 6000
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(214) 953-6000

ATTORNEYS FOR DEFENDANT,
MAUDINE BLAKEMAN

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA, Plaintiff	§	
VS.	§	CIVIL NO.
JAMES NEAL BLAKEMAN, as Executor of the Estate of C.E. BLAKEMAN, Deceased, MAUDINE BLAKEMAN, ROBERT EARL BLAKEMAN, KAREN A. WHALEY, RIDGLEA BANK, STATE OF TEXAS, TARRANT COUNTY, TEXAS, FORT WORTH INDEPENDENT SCHOOL DISTRICT and CITY OF FORTH WORTH, TEXAS, Defendants	§	4-86-511-K

INDEX TO AFFIDAVIT AND DEPOSITION PAGES REFERENCED IN MOTION OF DEFENDANT, MAUDINE BLAKEMAN, FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

I. AFFIDAVIT
Maudine Blakeman

II. DEPOSITION PAGES
A. James Neal Blakeman
B. Maudine Blakeman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA, Plaintiff	§	
VS.	§	CIVIL NO.
JAMES NEAL BLAKEMAN, as Executor of the Estate of C.E. BLAKEMAN, Deceased, MAUDINE BLAKEMAN, ROBERT EARL BLAKEMAN, KAREN A. WHALEY, RIDGLEA BANK, STATE OF TEXAS, TARRANT COUNTY, TEXAS, FORT WORTH INDEPENDENT SCHOOL DISTRICT and CITY OF FORTH WORTH, TEXAS,	§	4-86-511-K
Defendants	§	

BRIEF OF DEFENDANT, MAUDINE BLAKEMAN,
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

OPENING STATEMENT

This is a civil action by the United States to reduce to judgment certain federal estate tax liabilities of the Estate of C.E. Blakeman, deceased (the "Estate"); to foreclose the United States' federal tax lien against real property located in Tarrant County, Texas; for judgment against James Neal Blakeman, as Executor of the Estate; and for judgment against, among others, Defendants Maudine Blakeman, James Neal Blakeman, Robert Earl Blakeman and Karen A. Whaley.

Defendant, Maudine Blakeman, is the surviving widow of C.E. Blakeman, who died testate on May 25, 1978. Prior to his death, C.E. Blakeman resided with Maudine Blakeman on over 100 acres of real property located in Tarrant County, Texas (the "Tarrant County Property"). By Final Judgment entered May 7, 1980, the Probate Court of Tarrant County, Texas (i) designated the Tarrant County Property a rural homestead and (ii) confirmed Maudine Blakeman's homestead interest in 100 acres of the Tarrant County Property (the "Homestead Property"). Maudine Blakeman has continuously resided on the Homestead Property since the death of C.E. Blakeman.

On June 17, 1980, the Internal Revenue Service (the "Service") assessed the Estate for unpaid federal estate taxes and interest. The unpaid balance of the Estate's federal estate tax liability plus penalties and interest remain due and owing from the Estate. The Service has filed a Notice of Federal Tax Lien for the assessments against the Estate with the Tarrant County Clerk. Plaintiff seeks foreclosure of its federal tax lien on the Tarrant County Property.

Defendant, Maudine Blakeman, prays that this Court find as follows:

SUMMARY JUDGMENT ISSUES

I. That Defendant, Maudine Blakeman, is not personally liable for any of the estate taxes assessed against the Estate, thus, Plaintiff should take nothing against her;

II. That Defendant, Maudine Blakeman, is entitled to recover from Plaintiff the amount of her litigation expenses, including attorney's fees, incurred in connection with her defense of this action;

III. That, by reason of the findings of the Probate Court, (a) the Homestead Property is a rural homestead and (b) Defendant, Maudine Blakeman, has a homestead right for life in the Homestead Property;

IV. That the homestead right is the economic equivalent of a life estate in the Homestead Property and, as a result, that the value of the homestead interest of Defendant, Maudine Blakeman, is 74.423% of the total value of the Homestead Property;

V. That Defendant, Maudine Blakeman, be awarded 74.423% of the gross proceeds of a foreclosure sale if this Court orders a foreclosure of the Plaintiff's lien on the Homestead Property and a judicial sale of the Homestead Property to satisfy any remaining estate tax liability; and

VI. That any expenses of sale and any litigation expenses of Defendant, Maudine Blakeman, which are not recovered from Plaintiff, be charged against any gross proceeds attributable to the remainder interest in the Homestead Property.

UNDISPUTED FACTS

The following pertinent and undisputed facts are derived from the pleadings, documents and uncontroverted deposition and affidavit testimony.

1. C.E. Blakeman and Maudine Blakeman were married in 1973.

2. During their marriage, C.E. Blakeman and Maudine Blakeman resided on the Tarrant County Property, which was acquired by C.E. Blakeman prior to his marriage to Maudine Blakeman. (Deposition of Maudine Blakeman filed herewith, p. 7, hereinafter *MB Dep.*).

3. C.E. Blakeman died testate on May 25, 1978. He was survived by his wife, Maudine Blakeman, and by three adult children from a former marriage, who are Defendants, James Neal Blakeman, Robert Earl Blakeman and Karen A. Whaley.

4. Maudine Blakeman, who was born on June 20, 1928, was 49 years old at the date of death of C. E. Blakeman. (*MB – Dep.*, p. 132).

5. Pursuant to the Last Will and Testament of C.E. Blakeman (the "Will"), James Neal Blakeman was appointed Independent Executor of the Estate by the Probate Court.

6. The Will provides that after the payment of (i) all debts of the Estate and (ii) a bequest of $100,000.00 to James Neal Blakeman, the balance of the property in the Estate is to pass equally to James Neal Blakeman, Robert Earl Blakeman and Karen A. Whaley.

7. On May 7, 1980, the Probate Court entered a final judgment, a certified copy of which is attached as *Exhibit "A,"* designating the Tarrant County Property a rural homestead and awarding Maudine Blakeman a homestead interest in the Homestead Property. The Probate Court ordered that Maudine Blakeman have the use and

benefit of the Homestead Property for so long as she shall occupy the same as her homestead. (*Exhibit "A"*, p. 3).

8. Defendant, Maudine Blakeman, has continuously resided on the Homestead Property since the death of C.E. Blakeman and she intends to continue to occupy the Homestead Property as her homestead in the future. (*MB Dep.* p. 22 and Affidavit of Maudine Blakeman filed herewith, p. 1, hereinafter *"MB Aff."*).

9. Maudine Blakeman has paid the property taxes on the Homestead Property since 1980; moreover, her present intention is to continue to pay the property taxes. (*MB Dep.*, pp. 34-35).

10. James Neal Blakeman, as executor of the Estate, neglected to timely file the Estate's federal estate tax return or pay the Estate's federal estate tax liability on the due date as required by law. (Deposition of James Neal Blakeman filed herewith, pp. 21-22, 108-109 hereinafter *JNB Dep.*). Thereafter, the Service prepared and filed a federal estate tax return on behalf of the Estate. (*JNB Dep.*, pp. 21-22, 109 & Dep. Exhibits 2 and 3).

11. The federal estate tax return of the Estate reflects that $21,223.86 of life insurance proceeds were paid to the Estate and includible in the gross estate of the Estate. (*JNB Dep.*, Exhibits 2 and 3). Defendant, Maudine Blakeman, has not received any proceeds from life insurance policies payable upon the death of C.E. Blakeman and includible in the gross estate of the Estate. (*MB Aff.*, p. 1).

12. On June 17, 1980, the Service assessed the Estate for unpaid federal estate taxes plus penalties and interest.

The unpaid balance of the Estate's federal estate tax liability, plus penalties and interest, remain due and owing from the Estate. (*JNB Dep.*, p. 23 & Dep. Exhibit 4).

13. James Neal Blakeman, executor of the Estate, has admitted that there are no funds in the Estate to satisfy the federal estate tax obligation of the Estate. (*JNB Dep.*, p. 108).

14. The Service has filed a Notice of Federal Tax Lien with the Tarrant County Clerk.

15. Plaintiff seeks foreclosure of its federal tax lien on the Tarrant County Property. Plaintiff commenced this action to reduce to judgment the federal estate tax liabilities of the Estate; to foreclose the alleged federal tax lien against the Tarrant County Property; for judgment against Defendant, James Neal Blakeman, as Executor of the Estate; and against, among others, Defendants, Maudine Blakeman, James Neal Blakeman, Robert Earl Blakeman and Karen A. Whaley.

ISSUES OF LAW

On the facts set forth above, we may summarize the issues before the Court as follows:

1. Is Defendant, Maudine Blakeman, personally liable for any of the estate taxes assessed against the Estate, and is summary judgment appropriate?

2. If this Court grants summary judgment in favor of Defendant, Maudine Blakeman, is she entitled to recover from Plaintiff her litigation expenses, including attorneys' fees,

which she incurred in connection with her defense of this action?

3. Is the Homestead Property a rural homestead, and, if so, (i) does Defendant, Maudine Blakeman, have a homestead interest in the Homestead Property and (ii) is the homestead right the economic equivalent of a life estate in the Homestead Property?

4. If this Court decrees that there must be a foreclosure of Plaintiff's lien on the Homestead Property and a judicial sale of the Homestead Property to satisfy any remaining estate tax liability of the Estate, is Defendant, Maudine Blakeman, entitled to a portion of the gross proceeds realized at such judicial sale?

5. If this Court decrees that there must be a foreclosure of Plaintiff's lien on the Homestead Property and a judicial sale of the Homestead Property, how should the expenses of sale and litigation expenses of Maudine Blakeman be charged against the gross proceeds from the sale?

SUMMARY JUDGMENT STANDARD

As we shall show, applicable statutes and case law clearly support partial summary judgment for Defendant, Maudine Blakeman, in the relief she seeks, and in connection with Plaintiff's action to impose personal liability on Defendant, Maudine Blakeman. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court stated that:

> Summary judgment procedure is properly regarded not as a disfavored procedural short-cut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'

477 U.S. at 327 (quoting Fed. R. Civ. P. 1). The Court also stated that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis

477 U.S. at 327, *quoted in Slaughter v. Allstate Insurance Co.*, 803 F.2d 857, 860 (5th cir. 1986).

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. However, a movant for summary judgment need not support his motion with evidence negating his opponent's case, *Celotex Corp.*, 477 U.S. at 324[1] and when the movant shows that summary judgment is appropriate, the opposing

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[1] The Fifth Circuit has followed the Supreme Court's determination in *Celotex* that a district court is not required to independently evaluate the entire summary judgment record to see if there are fact issues precluding summary judgment. *Slaughter v. Allstate Insurance Co.*, 803 F.2d 857, 860 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195-97 (5th Cir. 1986)).

party must establish by specific facts that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Further, summary judgment may be entered against a party if after adequate time for discovery the party fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial.[2] *Celotex*, 477 U.S. at 324-326.

ARGUMENT

I. SECTION 6324(a)(2) OF THE CODE IS UNAVAILABLE TO PLAINTIFF AS A BASIS FOR PROCEEDING AGAINST DEFENDANT, MAUDINE BLAKEMAN.

In its Complaint, Plaintiff seeks to impose personal liability under Section 6324(a)[3] of the Internal Revenue Code upon Defendant, Maudine Blakeman, for unpaid federal estate taxes of the Estate. (*Complaint*, p. 5). Section 6324(a)(2) states, in part:

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[2] Defendant notes that the discovery deadline has passed.

[3] Plaintiff does not specify which subsection of Section 6324(a) allegedly imposes personal liability for the federal estate taxes of the Estate. Plaintiff presumably is seeking to impose personal liability on Defendant, Maudine Blakeman, under Section 6324(a)(2) since Sections 6324(a)(1) and (3) do not apply to Defendant, Maudine Blakeman.

Section 6324(a)(1) imposes a lien upon the gross estate of a decedent for 10 years from the date of death. In general, Section 6324(a)(2) imposes personal liability on transferees of property included in the gross estate under Sections 2034 to 2042. Section 6324(a)(3) generally provides for the continuance of the estate tax lien on the gross estate of a decedent after the service discharges an executor from personal liability for the estate tax.

> If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee . . . who receives, or has on the date of the decedent's death, *property included in the gross estate under sections 2034 to 2042, inclusive,* to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. (Emphasis added).

By its terms, Section 6324(a)(2) is restricted to a transferee who receives, or has on the date of the decedent's death, property included in the gross estate under Sections 2034 to 2042 inclusive. The gross estate of the Estate did not include any property under Sections 2034 through 2041. Section 2034 applies to dower or courtesy interests; Section 2035 applies to transactions in contemplation of death; Section 2036 applies to transfers with a retained life estate; Section 2037 applies to transfers taking effect at death; Section 2038 applies to revocable transfers; Section 2039 applies to annuities; Section 2040 applies to joint interests; and Section 2041 applies to powers of appointment. The gross estate did include $21,223.86 of life insurance proceeds which were paid to the Estate and includible in the gross estate of the Estate under Section 2042. (See copies of federal estate tax return of the Estate at *JNB Dep.* Exhibits 2 and 3). However, Defendant, Maudine Blakeman, has not received any proceeds from life insurance policies payable upon the death of C.E. Blakeman. (See *MB Aff.*, p. 1).

Since Defendant, Maudine Blakeman is neither a transferee or recipient of any property under Sections 2034 to 2042 of the Code nor did she have any such property on the date of death of C. E. Blakeman, she is not personally liable for the delinquent federal estate tax

liability. Thus, Section 6324(a)(2) is unavailable to Plaintiff as a basis for proceeding against Defendant, Maudine Blakeman. *See Street v. United States*, 310 F.Supp. 657 (S.D. Tex. 1969) (granting summary judgment against United States on same issue).

II. PURSUANT TO CODE SECTION 7430, DEFENDANT, MAUDINE BLAKEMAN, IS ENTITLED TO AN AWARD OF JUDGMENT FOR COSTS AND ATTORNEYS' FEES.

If certain conditions are met, Code Section 7430 authorizes this Court to award reasonable attorneys' fees and other reasonable costs to a prevailing party in any civil action brought by the United States in connection with the collection of any tax, interest or penalty. A taxpayer, however, may be awarded litigation costs only if (A) the taxpayer "has substantially prevailed" with respect to the most significant issues presented; (B) the taxpayer has exhausted the administrative remedies available within the Service; and (C) the position of the United States in the proceeding was not substantially justified. I.R.C. §§ 7430(b)(1) & (c). As is evident from the discussion below, Defendant, Maudine Blakeman, satisfies the conditions imposed by Section 7430 and thus is entitled to an award of costs and attorneys' fees.

A. Defendant, Maudine Blakeman, Has Substantially Prevailed on the Issue of Personal Liability.

Since Defendant, Maudine Blakeman, is entitled to judgment as a matter of law with respect to the issue of

her personal liability for the federal estate taxes of the Estate, she has "substantially prevailed."

B. Defendant, Maudine Blakeman, Did Not Have an Opportunity to Exhaust Administrative Remedies Since No Such Remedies Were Available to Her.

Since Plaintiff initially alleged the personal liability of Defendant, Maudine Blakeman, in Plaintiff's original Complaint, Defendant, Maudine Blakeman, did not have an opportunity to protest the nature of this claim within the administrative procedures of the service. Accordingly, Section 7430 should not be read to require Defendant, Maudine Blakeman, to have exhausted her administrative remedies within the Service when no such remedies were available to her.

C. Plaintiff's Position is Not Substantially Justified.

Plaintiff's position in this action is clearly not substantially justified. Since the Service (i) prepared the federal estate tax return for the Estate and (ii) should have examined the Will, which was a matter of public record, Plaintiff knew or should have known that Defendant, Maudine Blakeman, did not receive any property which was includible in the gross estate of the Estate under Sections 2034 to 2042 of the Code, and, as a result, that Defendant, Maudine Blakeman, was not personally liable for the federal estate taxes of the Estate.

In *Street v. United States*, 310 F.Supp. 657 (S.D. Tex. 1969), the Federal District Court addressed facts comparable to the instant facts. In *Street*, the United States

attempted to impose personal liability on the decedent's sole heir under Section 6324(a)(2) for unpaid estate taxes on property owned by the decedent and which was not included in her gross estate. The heir paid the additional amount of estate tax sought by the Service and subsequently instituted a refund suit in federal court. The *Street* court analyzed Section 6324(a)(2) and, in language supportive of Defendant, Maudine Blakeman, stated that Section 6324(a)(2) "restricts itself to a transferee who receives property included in the gross estate under §§ 2034 to 2042, inclusive. . . . Thus, § 6324(a)(2) is unavailable to defendant as a basis for proceeding against this plaintiff [who did not receive such property] for taxes due. . . . " 310 F. Supp. at 659. Agreeing with the taxpayer's argument in *Street* that the Government's position was not substantially justified, the District Court pointedly criticized the Government in bringing the lawsuit, "Had the Government been more careful in its reading of the statute the time and effort of both parties might have been saved." *Id.* at 660.[4]

In an analogous case, *Leewaye v. Commissioner*, 55 T.C.M. 485(1988), the Tax Court awarded litigation costs to the taxpayer pursuant to Section 7430. In *Leewaye*, the District Counsel of the Service drafted an answer to a Tax Court petition challenging a deficiency in income tax without reviewing the administrative file that he possessed. The administrative file contained the Service's acceptance of the petitioners' explanation. The Tax Court

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[4] In addition, the District Court held that the plaintiff was entitled to an estate tax deduction for the legal fees and expenses incurred as a result of the suit. 310 F. Supp. at 660-61.

concluded that an award for litigation costs was appropriate and stated, "[The Commissioner's] failure to review petitioners' administrative file in a reasonable and timely manner caused petitioners to incur more attorneys' fees than should have been necessary." *Leewaye*, 55 T.C.M.at 487.

Pursuant to *Street* and *Leewaye*, plaintiff should be charged with knowledge of the obvious elements (taken from the face of the statute) necessary to impose personal liability under Section 6324(a)(2) on Defendant, Maudine Blakeman. Plaintiff should have known that personal liability under Section 6324(a) could not be imposed on Defendant, Maudine Blakeman. As a result, the government's position was not justified at all, much less substantially justified.

III. IN THE ALTERNATIVE, DEFENDANT, MAUDINE BLAKEMAN, IS ENTITLED TO AN AWARD OF JUDGMENT FOR COSTS UNDER SECTION 2412(a) OF TITLE 28 OF THE UNITED STATES CODE.

Section 2412(a) of Title 28 of the United States Code provides for the award of litigation costs under certain circumstances. Section 2412(a) states, in part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States . . . in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall . . . be limited to reimburs[illegible]

> in whole or in part the prevailing party for the costs incurred by such party in the litigation.

28 U.S.C.A. § 2412(a) (West Supp. 1989). Costs enumerated in Section 1920 of Title 28 include fees for clerk costs, court reporters, printing, witnesses, copies and docket costs. 28 U.S.C.A. § 1920 (West Supp. 1989).

Section 2412(e) provides as follows:

> The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies . . . . Nothing in the preceding sentence shall prevent the awarding under subsection a of Section 2412 of title 28 . . . of costs enumerated in section 1920. . . .

The first sentence of Section 2412(e) provides the general rule that Section 2412 does not apply to income tax proceedings to which Section 7430 applies. The second sentence of Section 2412(e) qualifies the general rule, however, by providing that this Court has the discretion to award costs under Section 2412(a) ("Court Costs") notwithstanding the applicability of Section 7430. Defendant, Maudine Blakeman, is therefore entitled to request that this Court award Defendant, Maudine Blakeman, her Court Costs.

Section 2412(a) leaves the award of Court Costs entirely to the discretion of this Court, and imposes no standard with respect to the exercise of that discretion. The conduct of the Plaintiff and its departments, agencies, officers, agents and employees in attempting to

impose personal liability on Defendant, Maudine Blakeman, for the federal estate taxes of the Estate in opposition to the clear statutory authority under Section 6324(a)(2) justifies an award of judgment in favor of Defendant, Maudine Blakeman, for her Court Costs. Defendant, Maudine Blakeman, has incurred substantial litigation expenses in connection with this litigation and in a previous attempt by the Service to levy on the Homestead Property. (See *MB Aff.* p. 1). Just as in *Street*, a simple reading of Section 6324(a) by Plaintiff would have alerted Plaintiff that Defendant, Maudine Blakeman, is not liable under Section 6324(a)(2) for the federal estate taxes of the Estate.

IV. THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND DEFENDANT, MAUDINE BLAKEMAN, IS ENTITLED TO JUDGMENT AGAINST PLAINTIFF, AS A MATTER OF LAW, ON PLAINTIFF'S ACTION WHICH SEEKS TO IMPOSE PERSONAL LIABILITY ON DEFENDANT, MAUDINE BLAKEMAN, FOR UNPAID FEDERAL ESTATE TAXES.

Summary judgment should be granted in favor of Defendant, Maudine Blakeman, since the pleadings and supporting documentation establish that (i) Defendant, Maudine Blakeman, as a matter of law, may not be held personally liable by Plaintiff; and (ii) Defendant, Maudine Blakeman is entitled to a reasonable amount for her attorneys fees and costs under Section 7430, or, in the alternative, Defendant, Maudine Blakeman, is entitled to an award of judgment for her costs under Section 2412(a) of Title 28. *See generally Stafford v. United States*, 611 F.2d

990, 993 (5th Cir. 1980) (discussing standard for summary judgment in federal tax case).

The remaining issue, which is discussed below, is the relief sought by Defendant, Maudine Blakeman. More specifically, if this Court orders that any action be taken with respect to the Homestead Property to satisfy the federal estate taxes of the Estate what, as a matter of law, is the interest of Defendant, Maudine Blakeman, (i) in the Homestead Property and (ii) in any proceeds from a foreclosure and judicial sale of the Homestead Property?

V. THE HOMESTEAD INTEREST OF DEFENDANT, MAUDINE BLAKEMAN, IN THE HOMESTEAD PROPERTY IS WORTH 74.423% OF THE VALUE OF THE HOMESTEAD PROPERTY AND, AS A RESULT, DEFENDANT, MAUDINE BLAKEMAN, IS ENTITLED TO 74.423% OF THE PROCEEDS FROM A FORECLOSURE AND JUDICIAL SALE OF THE HOMESTEAD PROPERTY.

A. The Interest of Defendant, Maudine Blakeman, in the Homestead Property is a Vested, Possessory and Rural Homestead Interest and is Economically Equivalent to a Life Estate.

Since (i) Maudine Blakeman was married to C.E. Blakeman at the date of his death and (ii) Maudine Blakeman resided with C.E. Blakeman on their Homestead Property when C.E. Blakeman died, Texas law grants Maudine Blakeman a vested homestead interest in the Homestead Property. Tex. Const. art. XVI, §§ 50, 52. Maudine Blakeman's vested homestead interest in the

Homestead Property was confirmed by the final judgment of the Probate Court which designated the Homestead Property a rural homestead.

Further, Maudine Blakeman has maintained uninterrupted possession of the Homestead Property since the death of C.E. Blakeman and she intends to continue to occupy the Homestead Property as her homestead in the future. (See *MB Aff.* p. 1). Accordingly, Maudine Blakeman owns a vested, possessory and homestead interest in the rural Homestead Property. *See Williams v. Williams*, 569 S.W. 2d 867, 869 (Tex. 1978).

For purposes of valuation,. the homestead interest of Defendant, Maudine Blakeman, is the economic equivalent of a life estate in the Homestead Property. *See United States v. Rodgers*, 461 U.S. 677, 686 (1983); *Harris v. United States*, 764 F.2d 1126 (5th Cir. 1985).

B. The Life Estate of Defendant, Maudine Blakeman, Should be Valued, as a Matter of Law, by the Use of Tables Set Forth in Treasury Regulation Sections 20.2031-10(a) and (f).

Defendant, Maudine Blakeman, requests that this Court decree that, as a matter of law, the value of her life estate (homestead interest) in the Homestead Property should be determined by the use of the tables set forth in Treasury Regulation Sections 20.2031-10(a) and (f) (a copy of which is attached as *Exhibit "B"*). *Cf. Rogers*, 461 U.S. at 698-99; *Harris*, 765 F.2d at 1126. Further, Defendant, Maudine Blakeman, requests that this Court decree that, as a matter of law, the moment of assessment of the estate tax liability of the Estate is the date for measuring the

homestead interest of Defendant, Maudine Blakeman. *See Harris*, 764 F.2d at 1131. On the date of assessment, June 17, 1980, Maudine Blakeman's age was 51. The above-referenced tables assign a factor of .74423 to her life estate interest. Thus, her homestead interest, on June 17, 1980, was worth 74.423% of the value of the Homestead Property. Defendant, Maudine Blakeman, requests that this Court decree that, as a matter of law, the life estate (homestead interest) of Defendant, Maudine Blakeman, in the Homestead Property is worth 74.423% of the gross value of the Homestead Property.

C. If this Court orders a foreclosure of the Plaintiff's lien on the Homestead Property to satisfy any remaining estate tax liability, Maudine Blakeman's interest in the Homestead Property is 74.423% and, as a result, she is entitled to 74.423% from the gross proceeds of such foreclosure sale.

Section 7403 of the Code authorizes the District Court in this case to order a sale of the Homestead Property and distribute the sale proceeds in accordance with the interests of the parties in this case. Although the Supreme Court has declared that this Court need not always compel a foreclosure, *Rogers* [sic], 461 U.S. at 706, if this Court should order a foreclosure, then Section 7403 does not mandate a precise method of (i) valuing the interests of the parties and (ii) distributing the sales proceeds. The United States Supreme Court and the Fifth Circuit, however, have authoritatively told us how to value and distribute property interests in foreclosure suits brought under Section 7403.

The United States Supreme Court in *Rodgers* established guiding principles for foreclosing a tax lien under Section 7403 and distributing the sales proceeds. The facts in *Rodgers* are similar to the facts in the present case.[5] In *Rodgers*, the Government filed suit against Mrs. Rodgers, a nontaxpayer surviving spouse to (i) reduce to judgment assessments made against Mrs. Rodgers' deceased husband before his death for unpaid taxes and (ii) enforce the Government's tax liens, including liens that had attached to the decedent's interest in his property, including their homestead. After likening the homestead interest of the nontaxpayer surviving spouse in a Texas homestead to the economic equivalent of a life estate, the *Rodgers* Court held that, if a homestead is sold to satisfy the tax liability of a delinquent spouse, the nondelinquent spouse is entitled, as part of the distribution of proceeds required under Section 7403, to so much of the proceeds as represents complete compensation for the loss of the homestead interest.[6] 461 U.S. at 680, 698-99. The Supreme Court also indicated that the District Court should permit the calculation of the value of the nondelinquent spouse's

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[5] Mrs. Rodgers owned a city lot (i.e., an urban homestead), though, instead of pastureland (i.e., a rural homestead) like Maudine Blakeman here, but this distinction does not affect the relevance of the principles of *Rodgers*. *See Rodgers*, 461 U.S. at 684 n.6.

[6] The *Rogers* opinion clearly indicates that the Government may not collect, as satisfaction for the indebtedness owed to it, more than the value of the property interests actually liable for that debt. 461 U.S. at 690-91. Accordingly, no portion of Plaintiff's tax lien may be satisfied from the gross proceeds allocable to the homestead of Defendant, Maudine Blakeman (the nondelinquent spouse).

homestead interest to measure how the sale proceeds were to be allocated. *Id.* at 698-99.

The Supreme Court in *Rodgers* did not expressly dictate the precise method of valuing the homestead interest of the nontaxpayer surviving spouse, but did suggest that using standard commercial or statutory tables for measuring a life estate (and remainder) would permit (i) the calculation of the value of the homestead and (ii) the allocation of the sale proceeds. *Id.* Since *Rodgers*, the Fifth Circuit has provided direction concerning the appropriate allocation of sale proceeds following a foreclosure of a federal tax lien. In *Harris v. United States*, 764 F.2d 1126 (5th Cir. 1985), the Fifth Circuit valued the homestead interest using Treasury Tables instead of commercial actuarial tables as suggested by the Supreme Court in *Rodgers*. 764 F.2d at 1130-31. Further, the Court of Appeals indicated that the moment of assessment of the tax liability was the important moment for measuring the various property interests, not upon the later adjudication. *Id.* at 1131.[7]

On the date of assessment of the federal estate taxes of the Estate, the date Maudine Blakeman's life estate interest should be measured, Maudine Blakeman's age was 51. Pursuant to the decisions in *Harris* and *Molina*,

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[7] The Fifth Circuit also decided *United States v. Molina*, 764 F.2d 1132 (5th Cir. 1985), as a companion to *Harris*, and used the same guidelines articulated in *Harris*, namely, preferring the use of Treasury Tables instead of commercial tables. *See* W. Elliott, *Federal Tax Collections, Liens, and Levies* ¶9-8 (Prentice Hall/ Rosenfeld Launer Publications 1988) for calculations in both *Harris* and *Molina*, including computations by the District Court in *Molina* on remand.

the requisite factors for valuing a life estate on this date, using a 6 percent discount rate, are set forth in Treasury Regulation Sections 20.2031-10(a) and (f). The Treasury tables indicate that on the date of assessment, Maudine Blakeman's homestead interest was worth 74.423 percent of the value of the Homestead Property. The remainder interest was worth 25.577 percent of the value of the Homestead Property on this date.

In accordance with the consistent holdings in *Rodgers*, *Harris* and *Molina*, if this Court decrees that there must be a foreclosure of the Plaintiff's lien on the Homestead Property, Defendant, Maudine Blakeman, is entitled, as part of the distribution of proceeds required under Section 7403, to 74.423% of the gross sale proceeds.

VI. THE EXPENSES OF SALE AND ANY LITIGATION EXPENSES OF DEFENDANT, MAUDINE BLAKEMAN, WHICH ARE NOT AWARDED UNDER CODE SECTION 7430, SHOULD BE CHARGED AGAINST THE GROSS PROCEEDS ATTRIBUTABLE TO THE REMAINDER INTEREST IN THE HOMESTEAD PROPERTY.

A judicial foreclosure suit under the authority of Section 7403 is a plenary judicial action in which the district court is directed to "adjudicate all matters involved" and "finally determine the merits of all claims to and liens upon the property." I.R.C. § 7403; *United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985). In discharge of its duty to determine the priority of all competing claims, this Court may, but is not compelled to, decree the sale of property and order the distribution of the proceeds to the various parties (including

the Government). *United States v. Boyd*, 246 F.2d 477, 482 (5th Cir.), *cert. denied*, 355 U.S. 889 (1957).

In *United States v. 110-118 Riverside Tenants Corp.*, 886 F.2d 514 (2nd Cir. 1989) [hereinafter "*Riverside*"], the Second Circuit Court of Appeals addressed the issues of allocation of (i) expenses of a foreclosure proceeding and (ii) costs of sale. The *Riverside* case involved a foreclosure on shares of stock in a cooperative apartment corporation (the "Corporation"). In 1985, a judgment on the shares of the Corporation for unpaid taxes was entered. Shortly after the foreclosure of the tax lien, the taxpayer defaulted on obligations due to the Corporation. In January 1988, the Government and the Corporation agreed to sell the shares of the taxpayer. The Corporation solicited bids and contracted for and effectuated the sale of the shares. The Government paid none of the expenses incurred in the proceedings. After the sale, the Corporation claimed that it was entitled to recover expenses incurred in the foreclosure proceedings and additional costs incurred in the sale of the shares. The Government, on the other hand, argued that it was not liable for the expenses of the Corporation incurred in the foreclosure proceedings or sale.

The Second Circuit held that the expenses of the foreclosure proceeding, including attorneys' fees, should, as a matter of fairness, be paid by the Government. *Id.* at 520. In fact, the Court stated that "[i]t was the Government whose duty it was to foreclose the tax lien and collect the taxes from the sale of the shares." *Id.*

Similarly, the *Riverside* Court held that the expenses incurred by the Corporation in the sale of the shares,

including attorneys' fees, should be paid by the Government. In this regard, the Court stated as follows:

> There seems to be little doubt that if the stock had been effectuated by the Government, it would have been liable for the costs of the levy and sale. . . . Accordingly, there is no reason why the Government should not be liable to the Apartment Corporation for the expenses of these proceedings.
>
> The attorneys' fees incurred by the Corporation for selling the shares are in the same category as expenses of foreclosure and sale proceedings which the Government would have been required to incur. . . . They are, in reality, attorneys' fees and expenses which would be charged to the Government if it had foreclosed its own lien and sold the shares of stock.

Id. at 520-21.

Based on the holding in *Riverside*, the Government has the duty to foreclose a tax lien and sell property. Thus, any expenses incurred in the sale of the Homestead Property should be paid by the Government.

Further, the equities present here compel awarding to Mrs. Blakeman her litigation expenses that are not otherwise awarded under Section 7430. Maudine Blakeman did nothing to bring on the controversy. Following the death of C. E. Blakeman, James Neal Blakeman, as independent executor of the Estate, bore the sole fiduciary responsibility to collect and manage the assets of the Estate, pay all Estate liabilities, including to prepare and file the federal estate tax return and pay the resulting federal

estate tax liability. James Neal Blakeman has wholly failed in these responsibilities.

As a result, Maudine Blakeman (i) has experienced lengthy litigation proceedings (in this case and in a previous attempt by the Service to sell the Homestead Property through administrative sale), (ii) borne the cost of depositions and other extensive discovery to prepare this and previous controversies for resolution, and (iii) incurred other litigation expenses such as attorneys' fees and courts costs. *(MB Aff.*, p. 1-2). Although of limited means, Mrs. Blakeman has experienced financial hardship in this and prior litigation, all because the Executor of her husband's Estate neither filed an estate tax return nor paid the resulting estate tax. Further, if the Homestead Property is sold, Defendant, Maudine Blakeman, will likely incur large dislocation costs such as costs to move, obtaining replacement housing, and taxes on the forced sale of her interest in the property.

Pursuant to the authority vested in this Court by virtue of Section 7403, Defendant, Maudine Blakeman, requests that this Court order that the expenses of sale and the expenses incurred by Defendant, Maudine Blakeman, including reasonable attorneys' fees and personal dislocation costs, if any, which are not awarded under Section 7430 of the Code, be charged against the gross proceeds of sale attributable to the remainder interest in the Homestead Property. Further, Defendant, Maudine Blakeman, requests that her expenses be paid prior to the payment of any amount to Plaintiff.

CONCLUSION

Defendant, Maudine Blakeman, respectfully submits that upon the record before the Court, Defendant, Maudine Blakeman, should be awarded summary judgment granting the relief requested herein, and costs, including reasonable attorneys' fees.

Respectfully submitted,

JACKSON & WALKER

By: /s/ Wm. D. Elliott
Wm. D. Elliott

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion of Defendant, Maudine Blakeman, For Partial Summary Judgment and Brief in Support Thereof was sent by certified mail, return receipt requested to Mr. Waymon G. DuBose, Jr., Attorney, Tax Division, Department of Justice, Room 5B31, Federal Building, 1100 Commerce Street, Dallas, Texas 75242; Mr. William L. Kirkman, Bourland & Kirkman, 2800 Continental Plaza, Fort Worth, Texas 76102; Mr. David R. Seidler, Shannon, Gracey, Ratliff & Miller, 2200 First City Bank Tower, 201 Main Street, Fort Worth, Texas 76102; Mr. Bill Kimbrough, Assistant Attorney General, State of Texas, P.O. Box 12548, Austin, Texas 78711-2548; Mr. Stephen Meeks, Heard, Goggan, Blair, Williams & Harrison, 603 East Belknap Street, Fort Worth, Texas 76102; and Ms. Ann

Diamond, Assistant District Attorney, 200 West Belknap, Fort Worth, Texas 76196-0201, on this the 8 day of January, 1990.

/s/ Wm. D. Elliott
Wm. D. Elliott